55

(1)

Supreme Court, U.S.
FILED

No. 061471 MAY 03 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DENNIS W. GAY, ET AL.,
Petitioners,

v.

SARAH MORGAN, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GARY F. BENDINGER
HOWREY LLP
153 East 53rd St., 54th Floor
New York, N.Y. 10022
(212) 896-6500

JERROLD J. GANZFRIED
Counsel of Record
HOWREY LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

STEPHEN E. NAGIN
NAGIN, GALLOP & FIGUEREDO, PA
18001 Old Cutler Road
Miami, Florida 33157
(305) 854-5353

KENNETH M. KLIEBARD
DEANNA L. KEYSOR
HOWREY LLP
321 North Clark St., Ste. 3400
Chicago, IL 60610
(312) 595-1239

Attorneys for Petitioners, Dennis W. Gay, et al.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether, for purposes of determining the $5 million amount in controversy requirement for cases removed to federal court under the Class Action Fairness Act of 2005 ("CAFA"), the removing party must establish that amount by a "preponderance of the evidence" standard, as held by decisions of the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, or whether instead the defendant must meet a higher standard and establish the minimum amount in controversy "to a legal certainty," as held by the Third Circuit in this case?

2. Whether, in light of Congress' stated purpose in enacting CAFA to provide a federal forum for class action lawsuits, coupled with the "legal certainty" standard imposed by the Third Circuit, a plaintiff should be able to defeat federal jurisdiction and engage in potential gamesmanship by relying on a non-binding damages cap in its complaint, or on post-removal statements of counsel, as was permitted by the Third Circuit in conflict with decisions of this Court and other courts of appeals?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Petitioner-Defendants are Dennis W. Gay; Gina Gay; Basic Research, LLC; Ban, L.L.C.; Klein-Becker, USA L.L.C.; Covaxil Laboratories, L.L.C.; Carter-Reed Company, L.L.C., a/k/a The Carter-Reed Company; A.G. Waterhouse, L.L.C.; Alphagenbo Tech, L.L.C.; Body Forum, L.L.C.; Body Innoventions, L.L.C.; Covarix, L.L.C.; Bydex Management, L.L.C.; Nutrasport, L.L.C; Sovage Dermalogic Laboratories, L.L.C.; Western Holding, L.L.C.; George Evan Bybee; Daniel B. Mowrey, Ph.D; Nathalie Chevreau, Ph.D; Mitchell K. Friedlander; and Michael Meade. Respondent-Plaintiff is Sarah Morgan, who sued on behalf of herself and a putative class of similarly situated individuals.

RULE 29.6 STATEMENT

Petitioners state there are no publicly held parent companies or subsidiaries requiring disclosure under Rule 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION AND STATEMENT OF THE CASE 1

A. STATUTORY BACKGROUND OF CAFA 4

B. PROCEDURAL HISTORY OF THIS CASE 8

REASONS FOR GRANTING THE PETITION 11

I. THERE IS A SPLIT OF AUTHORITY ON THE STANDARD FOR REMOVAL TO FEDERAL COURT 12

A. The Third Circuit's "Legal Certainty" Test for Removal Conflicts with This Court's Precedent and Creates a Split of Authority with Other Courts of Appeals 12

B. Supreme Court Review is Needed to Prevent Manipulation and Abuse of the Rules for Determining Whether Federal Jurisdiction Exists 19

II. THE THIRD CIRCUIT'S RELIANCE ON PLAINTIFF'S COUNSEL'S POST-REMOVAL ARGUMENT IN ASSESSING THE AMOUNT IN CONTROVERSY IS IN DIRECT CONFLICT WITH THE COURT'S PRECEDENT.....22

III. THE THIRD CIRCUIT'S AFFIRMANCE OF REMAND TO STATE COURT CONFLICTS WITH THE DUTY TO EXERCISE FEDERAL JURISDICTION WHERE SUCH JURSIDICTION EXISTS.....24

CONCLUSION.....26

INDEX TO APPENDICES

APPENDIX A: Opinion of the United States Court of Appeals for the Third Circuit..... 1a

APPENDIX B: Opinion of the United States District Court for the District of New Jersey.....16a

APPENDIX C: Order of the United States Court of Appeals for the Third Circuit Denying Rehearing.....26a

APPENDIX D: Judgment of the United States Court of Appeals for the Third Circuit.....28a

APPENDIX E: Class Action Fairness Act of 2005.....30a

APPENDIX F: Class Action Complaint in the Superior Court of the State of New Jersey.....50a

TABLE OF AUTHORITIES

Page(s)

Alien v. R&H Oil & Gas Co.,
63 F.3d 1326 (5th Cir. 1995) 14

Brill v. Countrywide Home Loans, Inc.,
427 F.3d 446 (7th Cir. 2005) 14

Brooks v. GAF Materials Corp.,
No. 8:06-1613-HMH, 2006 WL 2077001 (D.S.C.
July 24, 2006) 21

De Aguilar v. Boeing Co.,
47 F.3d 1404 (5th Cir. 1995) 14, 15, 20, 21

Ford Motor Co. v. McCauley,
537 U.S. 1 (2002) 12

Gafford v. General Electric Co.,
997 F.2d 150 (6th Cir. 1993) 14, 15

Grant v. Chevron Phillips Chemical Co.,
309 F.3d 864 (5th Cir. 2002) 14

Hayes v. Equitable Energy Resources Co.,
266 F.3d 560 (6th Cir. 2001) 14

Hunt v. Wash. State Apple Adver. Commission,
432 U.S. 333 (1977) 24

Lang v. Baker,
501 A.2d 153 (N.J. 1985) 20

*Lowdermilk v. United States Bank National
Association*, 479 F.3d 994 (9th Cir. 2007) 4, 17, 24

Lowery v. Alabama Power Co.,
Nos. 06-16324, 06-16325, __F.3d__, 2007 WL 1062769 (11th Cir. Apr. 11, 2007) 16

Miedema v. Maytag Corp.,
450 F.3d 1322 (11th Cir. 2006) 14

In re Minn. Mutual Life Insurance Co. Sales Practices Litigation, 346 F.3d 830 (8th Cir. 2003) 16

Mitchell v. White Castle System, Inc.,
No. 94-1193, 1996 WL 279863 (6th Cir. May 24, 1996) 15

Nappe v. Anschelewitz, Barr, Ansell & Bonello,
477 A.2d 1224 (N.J. 1984) 25

Omi's Custard Co. v. Relish This, LLC,
No. 04-cv-861-DRH, 2006 WL 2460573 (S.D. Ill Aug. 24, 2006) 21

Oshana v. Coca-Cola Co.,
472 F.3d 506 (7th Cir. 2006) 14, 16, 24, 25

Poore v. American-Amicable Life Insurance Co.,
218 F.3d 1287 (11th Cir. 2000) 23

Quackenbush v. Allstate Insurance Co.,
517 U.S. 706 (1996) 11

Rogers v. Wal-Mart Stores, Inc.,
230 F.3d 868 (6th Cir. 2000) 14, 22, 23

Smith v. America General Life & Accident Insurance Co., 337 F.3d 888 (7th Cir. 2003) 14

St. Paul Mercury Indemnity Co. v. Red Cab Co.,

303 US. 283 (1938) ..... *passim*

Tropp v. W.-S. Life Insurance Co.,
381 F.3d 591 (7th Cir. 2004) 14

White v. FCI USA, Inc.,
319 F.3d 672 (5th Cir. 2003) 14

STATUTES AND RULES

28 U.S.C. § 1332 ..... 1, 8

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1441 1

28 U.S.C. § 1446 ..... 1, 17, 18

28 U.S.C. § 1453 ..... 1, 9, 18

N.J. Stat. Ann. § 56: 12-42 24

N.J. Ct. R. 4:42-6 20

LEGISLATIVE HISTORY

S. Rep. No. 109-14 (2005), *reprinted in* 2005
U.S.C.C.A.N. 3, 21 4-6

H.R. Rep. No. 108-144 (2003) 6

OTHER AUTHORITIES

Robert E. Bartkus, *Defendant's Removal Burden: CAFA Defendants Must Prove Minimum Amount in Controversy for Removal*, N.J. L. J. (Feb. 19, 2007) 16

H. Hunter Twiford, III et al., *CAFA's New "Minimal Diversity "Standard for Interstate Class Actions (ates a Presumption that Jurisdiction Exists, W.n the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. C. L. REV. 7, 67 (2005) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Dennis W. Gay, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 471 F.3d 469, and is reprinted in the Appendix to the Petition ("App.") at 1a. The opinion of the United States District Court for the District of New Jersey is unreported. *Id.* at 16a.

JURISDICTION

The district court's jurisdiction rested on 28 U.S.C. §§ 1332, 1441, 1446 and 1453. The court of appeals had jurisdiction to review the district court's judgment pursuant to 28 U.S.C. § 1453(c)(1). The court of appeals entered its judgment on December 15, 2006. App. at 28a. Petitioners' timely petition for rehearing was denied on February 2, 2007. App. at 26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 4(a) and 5 of the Class Action Fairness Act of 2005, codified at 28 U.S.C. §§ 1332(d)(2) and 1453 respectively, are reproduced at App. 30a.

INTRODUCTION AND STATEMENT OF THE CASE

In the Class Action Fairness Act of 2005 ("CAFA"), Congress sought to ameliorate problems that had bedeviled the nation's state judicial systems. One of the principal

components of the solution embodied in CAFA was an expansion of diversity jurisdiction for class action suits in the federal courts in light of Congress' concern over the willingness of state courts to ignore basic due process principles and the requirements for class certification, as well as to curtail proliferation of copycat cases. That expansion, coupled with the traditional requirement that federal courts must exercise the jurisdiction Congress has conferred, should have gone a long way toward accomplishing CAFA's objectives.

Unfortunately, judicially created roadblocks have prevented the achievement of Congress' goals. The Third Circuit's decision in this case exemplifies the impediments some courts have constructed to thwart the proper exercise of federal jurisdiction. At the core of this case is the Third Circuit's approach to the amount-in-controversy requirement for diversity jurisdiction under CAFA, but the principles upon which the court of appeals denied a federal forum resonate broadly to a wide array of circumstances in which cases are removed to federal court.

There can be no underestimating the deleterious consequences of a decision that rejects federal jurisdiction while acknowledging that "the plaintiff's claim in all likelihood exceeds $5 million"—the amount in controversy required for diversity jurisdiction under CAFA. App. at 10a. In reaching that untenable result, the Third Circuit crafted a number of hurdles to removal of cases from state court that conflict with decisions of this Court, numerous courts of appeals and Congress' intent.

Erroneously inverting this Court's holding in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 US. 283 (1938), the Third Circuit held that a defendant seeking to remove a case from state court must establish the amount in

controversy required for diversity jurisdiction "to a legal certainty." App. at 8a-9a. That exceptionally high standard conflicts with decisions of the Fifth, Sixth, Seventh, Eighth and Eleventh Circuits, which apply instead a "preponderance of the evidence" standard. *See* pages 13-16, *infra*.

The Third Circuit's incorrect standard would provide sufficient reason for this Court's review, even if it was the only error in the case. But it was not. Also contrary to this Court's holding in *St. Paul*—and in conflict with decisions of the Sixth and Eleventh Circuits—the decision below relied on post-removal statements by plaintiff's counsel as support for its finding that the amount in controversy might not exceed the jurisdictional minimum. App. at 11a. This aspect of the Third Circuit decision has wide-ranging adverse consequences for the federal judiciary by making the courts vulnerable to jurisdictional manipulation and gamesmanship. In this case, the dispositive statement purporting to limit damages to petitioners' New Jersey sales appeared for the first time in plaintiff's post-removal reply brief in support of her motion for remand to state court. *Id.* As exemplified by the record in this case, there is nothing speculative about recognizing the adverse consequences of a rule that shuts the doors to the federal courthouse on the basis of a belated (post-removal), non-evidentiary (comment by counsel in reply brief), nonbinding submission such as the statement upon which the Third Circuit relied.

The Third Circuit further deviated from other courts of appeals in relying on the *ad damnum* clause in plaintiff's state court complaint, which purported to cap damages below $5 million. App. at 8a-10a. Other courts of appeals have recognized that where state court rules give no binding effect to a purported limitation of damages included in a complaint, a district court should not rely on a non-binding *ad damnum*

clause in determining the amount in controversy for federal jurisdiction. *See* pages 19-20, *infra.*

The deleterious impact of this decision is not merely hypothetical. The Third Circuit decision in this case already has been cited with approval by the Ninth Circuit. *Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007). Moreover, several district courts have commented on the mischief that will result from rules that impede the removal of cases for which Congress expressly sought to provide a federal forum. And in light of the proliferation of class action lawsuits, the Third Circuit's decision, if allowed to stand, would thwart Congress' purpose in enacting CAFA.

To ensure that CAFA's salutary purpose is served, to adhere to Congress' stated intent, and to preclude the construction of judicial roadblocks to the proper exercise of jurisdiction by federal courts, this Court's review is needed in this case.

A. STATUTORY BACKGROUND OF CAFA

Congress enacted CAFA in order to address problems it recognized in the treatment of class actions by state courts. App. at 31a-32a. In particular, Congress was concerned with a "parade of abuses" that occur in state court class actions, the trampling of a defendant's due process rights, and the "judicial blackmail" against corporate defendants that ensues, forcing them to settle even patently frivolous cases. S. Rep. No. 109-14, at 20-21 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21.

The legislative history explains why Congress broadened federal jurisdiction over class action suits: to halt the "parade of abuses" that occur in state-based class actions. *See* S. Rep. 109-14, at *6 (2005), *reprinted in* 2005

U.S.C.C.A.N. 3. The Senate Report explains that "[o]ne key reason for these problems is that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." *Id.* at *5.

Congress also found that due process rights have been trampled in the state court adjudication of class actions, with state courts improperly applying class certification requirements. *Id.* at *21-22. "One reason for the dramatic explosion of class actions in state courts is that some state court judges are less careful than their federal court counterparts about applying the procedural requirements of Rule 23 (or the state's parallel governing rule), which are intended to protect the due process rights of both unnamed class members and defendants." *Id.* at *14. In fact, Congress explained, "some state courts with this permissive attitude have even certified classes that federal courts had already found uncertifiable." *Id.* at *22.

Congress expressed pointed disapproval of the frequent use of state class actions as a form of "judicial blackmail" against corporate defendants, forcing them to settle even patently frivolous claims. *Id.* at *20-21. "[S]tate court judges often are inclined to certify classes for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial." *Id.*

In addition, Congress found that "multiple class action cases purporting to assert the same claims on behalf of the same people often proceed simultaneously in different state courts, causing judicial inefficiencies and promoting

collusive activity," and that "many state courts freely issue rulings in class action cases that have nationwide ramifications, sometimes overturning well-established laws and policies of other jurisdictions." *Id.* at *4; *see also id.* at *6 ("there appears to be state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation"). Defendants were unfairly forced to litigate multiple identical state court class actions because there is no mechanism for consolidating the cases in state courts. *Id.* at *23.

In enacting CAFA, Congress moved to curb these abuses. One important change was abolition of the one-year removal deadline to eliminate a type of gamesmanship practiced by some class action lawyers. 28 U.S.C. § 1453. Congress specifically based section 1453 on its opposition to tactics by plaintiffs' lawyers who waited and then amended complaints to create federal jurisdiction only after the one-year period had expired, allowing them to "eat their cake and have it too." *See* H.R. Rep. No. 108-144 (2003) at 43; S. Rep. No. 109-14, at *50.

Another way Congress sought to improve class action adjudication was to broaden federal diversity jurisdiction over class action cases by facilitating easier removal for such cases from a state to federal forum:

> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—
>
> (A) keeping cases of national importance out of Federal court;

> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.
>
> (b) PURPOSES.—The purposes of this Act are to—
>
> . . . .
>
> (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction . . . .

App. at 31a-32a. To achieve these laudable goals, CAFA includes several provisions that were intended to increase broadly the availability of diversity jurisdiction for class actions. For example, only minimal diversity is required, wherein "any member of a class of plaintiffs is a citizen of a State different from any defendant," App. at 40a, the claims of the individual class members are aggregated to determine the amount in controversy, *id.* at 43a; there is no time limit on removal (formerly one year from the filing of the complaint), *id.* at 46a; any defendant may remove an action to federal court without the consent of co-defendants, *id.*; "mass actions," not brought as class actions, qualify for removal under class action rules, *id.* at 44a; and discretionary appeals of remand orders are now permitted, *id.* at 46a.

This case concerns section 4 of CAFA, codified at 28 U.S.C. § 1332(d)(2), which provides for federal diversity jurisdiction over class actions in which there is minimal diversity of citizenship, and "in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." App. at 40a-41a. More specifically, there is disagreement among the courts of appeals as to the proper burden of proof to be applied to a removing defendant seeking to show the amount in controversy, as well as what evidence a court may consider in making the amount-in-controversy determination.

B. PROCEDURAL HISTORY OF THIS CASE

Plaintiff, purporting to represent a class of similarly situated consumers, filed this action in New Jersey Superior Court. App. at 50a. Plaintiff asserted claims under the New Jersey Consumer Fraud Act, as well as common law fraud, unjust enrichment, breach of warranty, and injunctive relief based on supposed false advertising claims by the defendants—manufacturers of the skin cream StriVectin-SD. App. at 68a-73a.

Plaintiff's complaint sought trebled compensatory damages, attorneys' fees and costs, punitive damages, and injunctive relief. App. at 73a-74a. In an attempt to dodge federal court jurisdiction, the complaint also purported to cap monetary damages at less than $5 million—the jurisdictional threshold for federal class action diversity jurisdiction under CAFA. App. at 74a ("the total sum or value of the recovery for all causes of action for damages, trebled damages, punitive damages, interest, costs, attorneys' fees and injunctive relief shall in no event exceed $5,000,000").

Pursuant to CAFA, petitioners removed the action to the United States District Court for the District of New

Jersey. Plaintiff moved for remand to the state court, asserting that the $5 million amount in controversy requirement had not been satisfied. In granting the motion to remand, the district court relied on plaintiff's post-removal argument to limit the requested damages to New Jersey sales of petitioners' product (a contention made for the first time in plaintiff's reply brief supporting remand). Moreover, the court's assessment of the amount in controversy did not include the cost of the injunctive relief, attorneys' fees or punitive damages in its calculation. App. at 22a-24a.

The Third Circuit granted petitioners leave to appeal the district court's remand order pursuant to 28 U.S.C. § 1453. In an issue of first impression for the Third Circuit, the court created a new and heightened standard for determining whether the amount in controversy requirement has been met in an action removed from state court pursuant to CAFA. Rather than join the Fifth, Sixth, Seventh, and Eighth Circuits, which had previously determined that a removing defendant need only show that the jurisdictional amount in controversy was present by a "preponderance of the evidence," the Third Circuit created a different standard, placing on a removing defendant the burden of proving "to a legal certainty" that the amount in controversy required for federal jurisdiction is present. App. at 8a-9a.

In determining that petitioners failed to meet the "legal certainty" standard, the Third Circuit acknowledged that plaintiff's complaint "is at least ambiguous as to whether disgorgement [sought by plaintiff] applies to nationwide profits or New Jersey profits." App. at 11a. Despite the vagueness of the complaint, the Third Circuit affirmed the district court's limitation of the amount in controversy to defendants' profits from sales in New Jersey. App. at 14a. In so doing, the Third Circuit recognized that "the plaintiff did not explicitly limit the disgorgement of profits demand to

New Jersey sales rather than nationwide sales until her remand reply brief." App. at 11a. The Third Circuit nevertheless allowed plaintiff's post-removal attorney argument to narrow the scope of damages. The opinion does not explain how that ruling could be squared with this Court's holding in *St. Paul* that jurisdiction must be decided as of the time of removal, and cannot be narrowed by a plaintiff's post-removal actions or filings. *See* pages 20-21, *infra.*

The court of appeals similarly rejected petitioners' contention that the punitive damages requested by plaintiff should bring the case over the amount in controversy threshold for federal jurisdiction. Rather, the court found that petitioners had the burden to demonstrate the "sort" of punitive damages to which plaintiff would be entitled, in addition to their reasonable value. App. at 10a. Despite New Jersey's clear provision of statutory authority for punitive damages for plaintiff's claims, and plaintiff's explicit request that she and the putative class be awarded punitive damages, these damages were also excised from the Third Circuit's amount-in-controversy calculation. App. at 10a-11a.

Even with all these limitations, the court of appeals found that just the monetary damages sought in plaintiff's complaint easily exceeded $4 million in controversy. App. at 12a. Noting plaintiff's position that the size of the class was "likely to be far larger than 10,000" members, the court of appeals multiplied 10,000 by the full-price cost of only one tube of defendant's product ($135) per consumer. *Id.* The resulting figure, trebled per plaintiff's damages request, amounts to $4,050,000. *Id.*

The court of appeals further relied on plaintiff's statement in her state court complaint purportedly capping damages below the jurisdictional threshold of $5 million.

Although acknowledging that this supposed limitation of damages is completely non-binding in New Jersey, the court of appeals found that plaintiff's position as master of her complaint allowed her to defeat federal jurisdiction in this manner. App. at 8a, 13a-14a. The court of appeals acknowledged that its decision "create[s] the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading." App. at 14a. As a remedy for such abuse, the court of appeals merely suggested that a defendant could argue for judicial estoppel following remand.

After laying out its new rules on removal, the court of appeals recognized that "[i]f this court had all the information available to make such a determination, our conclusion here might be that the plaintiff's claim in all likelihood exceeds $5 million." App. at 10a. The court did not, however, allow petitioners an opportunity to meet its new "legal certainty" test. Instead of directing the district court to make a further evaluation of all the information, the court of appeals affirmed the district court's remand to state court.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with decisions of this Court and other courts of appeals on an important issue of federal jurisdiction and judicial administration. Moreover, the decision below is directly contrary to the expressly stated purpose of CAFA. There is a fundamental incompatibility between this Court's holding that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress," *Quackenbush v. Allstate Ins. Co.*, 517 U.S.

706, 716 (1996), and the Third Circuit's rejection of jurisdiction in a case that "in all likelihood" could meet the amount in controversy requirement for federal jurisdiction. In announcing a new and heightened standard for removal jurisdiction, the decision below makes profound changes to the jurisdiction of federal courts that have wide-ranging practical ramifications. This Court's review is needed to resolve the existing conflict of authorities, to preserve the solution Congress selected, and to restore the proper standards for assessing federal jurisdiction.[1]

I. THERE IS A SPLIT OF AUTHORITY ON THE STANDARD FOR REMOVAL TO FEDERAL COURT.

A. The Third Circuit's "Legal Certainty" Test for Removal Conflicts with This Court's Precedent and Creates a Split of Authority with Other Courts of Appeals.

The Third Circuit created a standard for removal that places the burden on the removing defendant to prove that the amount in controversy threshold of $5 million has been met "to a legal certainty." App. at 9a-10a. The decision below is based on a misperception of *St. Paul Mercury Indemnity Co.*, 303 U.S. at 294, in which this Court addressed the standard to be applied where a plaintiff brings suit in federal court based on diversity jurisdiction, and the defendant seeks to dismiss based on a failure to satisfy the

---

[1] In 2002, this Court granted, but later dismissed certiorari in *Ford Motor Co. v. McCauley*, 537 U.S. 1, a case where there was also a split in how to calculate the amount in controversy to obtain federal jurisdiction in class action cases.

amount in controversy requirement. *Id.* at 288. This Court held:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. *It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.*

Id. at 288-89 (emphasis added) (footnotes omitted).

Thus, the rule in *St. Paul* is that the party *challenging* federal jurisdiction bears the burden of defeating federal jurisdiction under a "legal certainty" standard. Yet the Third Circuit inexplicably flipped that burden here and placed it on the party seeking to *establish* federal jurisdiction. Not only is there no support in *St. Paul* for placing the heightened burden on a defendant seeking to establish federal jurisdiction, but doing so would also contravene the stated congressional policy underlying CAFA. Indeed, the Third Circuit's standard is nearly insurmountable where, as here, a defendant is faced with the onus of showing that the requisite amount in controversy is present "to a legal certainty" based on plaintiff's own often vague and conclusory pleadings. While petitioners recognize that they have the burden of coming forward in establishing federal jurisdiction, once they have made such a facial showing, the high standard imposed by the Third Circuit should be placed on the party challenging jurisdiction.

Not surprisingly, the Third Circuit's formulation creates a circuit split with the Fifth, Sixth, Seventh, Eighth

and Eleventh Circuits. Each of these appellate courts has adopted a standard that, in line with the rationale of the *St. Paul* decision, places a burden on the removing defendant to prove that the amount in controversy requirement has been met only by a "preponderance of the evidence," as opposed to the Third Circuit's "legal certainty" standard. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1331 (11th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448-49 (7th Cir. 2005); *Tropp v. W.-S. Life Ins. Co.*, 381 F.3d 591, 595 (7th Cir. 2004); *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003); *Smith v. Am. Gen. Life & Accident Ins. Co.*, 337 F.3d 888, 894-95 (7th Cir. 2003); *White v. FCI USA, Inc.*, 319 F.3d 672, 676 (5th Cir. 2003); *Grant v. Chevron Phillips Chem. Co.*, 309 F.3d 864, 869 (5th Cir. 2002); *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 572 (6th Cir. 2001); *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871 (6th Cir. 2000); *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993). If the defendant meets this standard, then the *plaintiff* may defeat federal jurisdiction only with a showing that the amount in controversy is actually below the jurisdictional threshold "to a legal certainty." *See In re Minn. Mut.*, 346 F.3d at 834; *Smith*, 337 F.3d at 893; *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir. 1995).

The Fifth Circuit, for example, recognizes the non-binding nature of *ad damnum* clauses in state courts would create the "potential for abusive manipulation" if such clauses were relied on in determining the amount in controversy. *De Aguilar*, 47 F.3d at 1410. Indeed, the Fifth Circuit specifically rejected the "legal certainty" requirement embraced by the Third Circuit as being in "conflict with our past decisions that have stated that the standard for determining jurisdictional amount should favor those parties

seeking to invoke the jurisdiction of a federal district court," and also found that the stricter burden on removing defendants would "fail[] adequately to protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court following remand." *Id.* at 1411 (internal quotations omitted). The court therefore placed the burden on a removing defendant to show the amount in controversy by a preponderance of the evidence. *Id.* at 1411-12. If defendant makes this showing, the plaintiff must show that "as a matter of law, it is certain that he will not be able to recover more than the damages for which he has prayed in the state court complaint" in order to secure a remand back to state court. *Id.* at 1411.

Similarly, the Sixth Circuit places a "preponderance of the evidence" burden on the removing defendant in light of a plaintiff's ability to "claim in his or her complaint an amount lower than the federal amount-in-controversy requirement in an attempt to defeat federal jurisdiction, while actually seeking and perhaps obtaining damages far in excess of the federal requirement." *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 157-58 (6th Cir. 1993); *Mitchell v. White Castle Sys., Inc.*, No. 94-1193, 1996 WL 279863, at *1 (6th Cir. May 24, 1996) (unpublished) (applying *Gafford* standard to case where plaintiff's *ad damnum* clause claimed less than federal jurisdictional amount).

The Seventh and Eighth Circuits also follow the rule that, where a state court complaint demands less than the federal jurisdictional amount, the removing defendant "has the burden of showing by a preponderance of the evidence facts that suggest the amount-in-controversy requirement is met. . . . Once the defendant in a removal case has established the requisite amount in controversy, the plaintiff can defeat jurisdiction only if 'it appears to a legal certainty

that the claim is really for less than the jurisdictional amount.'" *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006) (citations omitted); *see also In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d at 834 (same). In other words, consistent with this Court's decision in *St. Paul* and consistent with the Fifth Circuit, the Seventh and Eighth Circuits place the "to a legal certainty" standard on the party challenging removal, and place a lower evidentiary standard on the proponent of federal jurisdiction.

The Eleventh Circuit's recent decision in *Lowery v. Alabama Power Co.*, Nos. 06-16324, 06-16325, --F.3d--, 2007 WL 1062769 (11th Cir. Apr. 11, 2007) (not yet reported), also held that where a complaint does not specify the amount of damages sought the removing defendant has the burden to show the jurisdictional amount by a "preponderance of the evidence," *id.* at *16.

In direct conflict with *all* circuits that had previously considered the issue, the Third Circuit thwarted the Congressional intent behind CAFA by making it much harder for a defendant to remove a case to federal court.[2] The Third Circuit is no longer alone, however, resulting in a clear split of authority which will worsen without this Court's intervention. The Ninth Circuit recently adopted the Third Circuit's flawed "legal certainty" standard, holding that "[w]here the plaintiff has alleged her facts and pled her damages, and there is no evidence of bad faith, the defendant must not only contradict the plaintiff's own assessment of

---

[2] *See, e.g.*, Robert E. Bartkus, *Defendant's Removal Burden: CAFA Defendants Must Prove Minimum Amount in Controversy for Removal*, N.J. L. J. (Feb. 19, 2007) (analyzing the Third Circuit's decision in this case, and concluding that the "Third Circuit appears to have taken a more antagonistic stance toward removal under CAFA"; "defendants in the Third Circuit will face a more difficult time removing class actions at the margin of CAFA's jurisdictional requirement").

damages, but must overcome the presumption against federal jurisdiction." *Lowdermilk v. United States Bank National Association*, 479 F.3d 994, 999 (9th Cir. 2007). In finding that the defendant had to "overcome the presumption against federal jurisdiction," *id.*, however, the Ninth Circuit ignored Congress' express intent in passing CAFA to substantially expand access to the federal courts for class action defendants to "make federal courts more available to class action litigants." *See* H. Hunter Twiford, III *et al.*, *CAFA's New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, With the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. C. L. REV. 7, 67 (2005).

In addition to being legally unsound, the Third Circuit's heightened requirement of "legal certainty" is unworkable as a practical matter in light of CAFA's stated objective of providing a federal forum for class action lawsuits. Prior to CAFA, class action defendants were required to remove to federal court within one year after the state court complaint was filed. 28 U.S.C. § 1446(b).[3]

---

[3] As provided in 28 U.S.C. § 1446(b):

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it

Under CAFA, however, the one-year limitation is abolished for class actions, and removal may be sought at any time:

> A class action may be removed to a district court of the United States in accordance with section 1446 (*except that the 1-year limitation under section 1446(b) shall not apply*), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

28 U.S.C. § 1453(b) (citations omitted).[4] In light of the heightened burden imposed by the Third Circuit, many defendants will be forced to delay removing actions to federal court until they have gathered sufficient evidence to satisfy that extraordinarily high burden. This may require the defendant to engage in discovery (no doubt following motion practice directed at the pleadings and possibly a class certification motion as well) before the defendant has enough information or clarification of a vague complaint to remove the action. Putting aside the delay and needless consumption of judicial resources that will flow from such an approach, in the interim the defendant will be forced to litigate in the very state courts for which CAFA was meant to provide an alternative. By granting review and rejecting the rule

---

> may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action. (citation omitted.)

[4] Removal to federal court still must occur within thirty days of the filing that makes the presence of federal jurisdiction apparent. 28 U.S.C. § 1446(b).

adopted by the Third and Ninth Circuits, and instead adopting the rule accepted by the other circuits that have addressed this issue, this Court can prevent such thwarting of CAFA's purpose.

B. Supreme Court Review is Needed to Prevent Manipulation and Abuse of the Rules for Determining Whether Federal Jurisdiction Exists.

While the existing conflict of authority alone warrants this Court's review of the decision below, review is also warranted in light of the very real potential for litigants to engage in manipulation or gamesmanship to avoid federal jurisdiction—gamesmanship made possible by the Third Circuit's impossibly high evidentiary burden placed on a removing defendant in combination with the apparent deference given to an illusory damages cap in the plaintiff's state court complaint. Because such damages caps are seldom binding, even the Third Circuit acknowledged its decision "create[s] the potential for abusive manipulation by plaintiff." App. at 14a. This potential for abuse stemming from the decision below further warrants this Court's resolution of the appropriate removal standards.

In the proceedings below, the court opened the door to all manner of mischief by, on the one hand, allowing a plaintiff to limit her monetary claims pled in her complaint in order to avoid the jurisdiction threshold, and at the same time imposing an impossibly high evidentiary burden on a removing defendant to overcome the presumptive effect of that damages limitation. In her complaint, plaintiff intentionally tried to circumvent CAFA by specifically pleading less than $5 million in monetary damages. App. at 74a. The Third Circuit rewarded this approach, noting that "[a] plaintiff, if permitted by state laws, may limit her monetary claims to avoid the amount in controversy

threshold . . . ." App. at 9a-10a. Naturally, such a damages disclaimer can be entirely arbitrary and not based on any reasoned analysis of the real amount in controversy. But under the Third Circuit's rule, a defendant facing such a damages cap then must prove to a legal certainty that the amount in controversy is met. The Third Circuit's test may be impossible for a defendant to satisfy: the 'legal certainty' standard sets a high bar for the party seeking removal. Defendants in this situation will, predictably, face remand to state court. In many states, including New Jersey, plaintiffs are not limited to the amounts they have requested in their complaints, and so such damages limitations are illusory.[5] The effect of all of this is to allow crafty class action lawyers to engage in a game of jurisdictional "bait and switch"—first pleading a damages cap amount less than a jurisdictional threshold to evade CAFA's laudable goal of providing a federal forum for important class action cases, and then being able to disregard that damages cap once the case is remanded to state court.

Indeed, the Third Circuit recognized the potential for abuse stemming from its decision:

> we agree with the Fifth Circuit's statement in *De Aguilar* that "[t]hese new rules have created the potential for abusive manipulation by plaintiffs, who may plead damages below

---

[5] *See, e.g., DeAguilar*, 47 F.3d at 1410 ("The majority of states now, however, have followed the example of Fed. R. Civ. P. 54(c) and do not limit damage awards to the amount specified in the *ad damnum* clause of the state pleading."); *Lang v. Baker*, 501 A.2d 153, 158 (N.J. 1985); N.J. Ct. R. 4:42-6 ("Every final judgment, except final judgments by default, shall grant the relief to which the party in whose favor it is rendered is entitled even though that party has not demanded such relief in the pleadings, provided the parties have been given an adequate opportunity to be heard as to the relief granted.").

> the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading."

App. at 14a (quoting *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995)).[6] Although the Third Circuit posited that judicial estoppel might protect a defendant from such abuses, App. at 14a, such protections offer little comfort to defendants, who might undergo a plethora of state actions, with inconsistent rulings, rather than proceed in a federal forum where MDL Rules would avoid such a result. After all, it would be up to the state courts to decide whether to employ judicial estoppel, and these are the very state courts that led to Congressional enactment of CAFA to provide a federal forum for such claims.

---

[6] *See also Brooks v. GAF Materials Corp.*, No. 8:06-1613-HMH, 2006 WL 2077001, at *2 n.1 (D.S.C. July 24, 2006) (unpublished) (court relied on the plaintiff's *ad damnum* clause to order remand to the state court, but recognized the "potential for manipulation" with the toothless admonition that "a subsequent increase in the amount sought by plaintiffs would not be a good career move for plaintiffs' attorneys considering their anticipated future dealings with this court.") (quotation omitted); *Omi's Custard Co. v. Relish This, LLC*, No. 04-cv-861-DRH, 2006 WL 2460573, at *1 (S.D. Ill. Aug. 24, 2006) (unpublished) (after defendant failed to meet burden of showing the jurisdictional amount in controversy had been met and case was remanded, and plaintiff made a discovery disclosure estimating its damages more than three times higher than the federal jurisdictional threshold, the district court acknowledged "circumstantial evidence that appears to indicate suspicious behavior, perhaps gamesmanship, on the part of Plaintiff," but found that "the principles of comity and the Federal Rules of Civil Procedure" prevented any curtailment of the plaintiff's manipulations).

Other courts of appeals, no doubt mindful of the potential for abuse, have created less burdensome standards for removing defendants or have ignored altogether a plaintiff's attempt to plead a cap on monetary damages to prevent the possibility of jurisdictional mischief. For example, the Seventh Circuit's decision in *Oshana* recognized that the plaintiff's disclaimer of damages was not binding in state court and so the "disclaimer had no legal effect." 472 F.3d at 511; *see also Rogers,* 230 F.3d at 873 (court did not give effect to non-binding damages limitation in deciding amount in controversy). Yet the court below attached some weight to plaintiff's non-binding damages limitation in her state court complaint. Given the potential for jurisdictional manipulation and gamesmanship that can ensue when a defendant must then overcome an arbitrary damages cap with evidence establishing the jurisdictional amount to a "legal certainty," this Court should grant the petition and clarify the appropriate standards for removal.

II. THE THIRD CIRCUIT'S RELIANCE ON PLAINTIFF'S COUNSEL'S POST-REMOVAL ARGUMENT IN ASSESSING THE AMOUNT IN CONTROVERSY IS IN DIRECT CONFLICT WITH THIS COURT'S PRECEDENT.

In finding that defendants failed to meet their burden of showing that plaintiff's complaint did not meet the $5 million amount in controversy requirement, the Third Circuit approved the district court's consideration of plaintiff's post-removal arguments that the disgorgement damages sought in the complaint were restricted to New Jersey. App. at 11a. The court acknowledged that:

> The plaintiff's initial complaint is at least ambiguous as to whether disgorgement applies to nationwide profits or New Jersey

> profits. As the defendants note, the plaintiff did not explicitly limit the disgorgement of profits demand to New Jersey sales rather than nationwide sales until her remand reply brief.

Id. In reliance on this post-removal argument, the court limited its amount-in-controversy inquiry to New Jersey sales only.

This aspect of the Third Circuit ruling failed to adhere to this Court's holding that the jurisdiction of a federal court is determined as of the time of removal. *St. Paul Mercury*, 303 U.S. at 292, speaks directly to this point: "And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction." Post-removal affidavits, stipulations and amendments are without effect on the question of the amount in controversy. *Id.* The decision below conflicts with the holdings of other circuits on this point as well. *See Rogers*, 230 F.3d at 872 (refusing to consider plaintiff's post-removal stipulation reducing the amount in controversy); *Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1291 (11th Cir. 2000) (holding that post-removal amendment of complaint could not affect amount in controversy question). Here, there was not even an affidavit or anything of evidentiary value that defeated federal jurisdiction. Rather, Plaintiff attempted to limit the amount in controversy solely through an eleventh-hour attorney argument in her reply brief in support of her motion to remand to state court.

III. THE THIRD CIRCUIT'S AFFIRMANCE OF REMAND TO STATE COURT CONFLICTS WITH THE DUTY TO EXERCISE FEDERAL JURISDICTION WHERE SUCH JURISDICTION EXISTS.

The Third Circuit compounded its error and exacerbated its departure from this Court's precedent in finding that the amount in controversy required for federal jurisdiction had not been shown. App. at 10a-12a.

First, this Court has instructed that the value of any requested injunctive relief must be included in the amount in controversy. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). In the instant case, Plaintiff's complaint seeks a nationwide recall of all petitioners' product as well as an injunction barring petitioners from "marketing, advertising, promoting, distributing, or selling" their product with any representations of safety or efficacy. Despite this Court's directive in *Hunt*, the lower courts failed to include the draconian injunctive relief requested in plaintiff's complaint in performing the amount in controversy evaluation.

Second, the Third Circuit failed to include attorneys' fees in the amount-in-controversy calculation (or even in its discussion). These are also proper elements of the jurisdictional amount in controversy. *Lowdermilk*, 479 F.3d at 1000; *Oshana*, 472 F.3d at 512. Such fees are specifically provided for under New Jersey law. N.J. Stat. Ann. § 56: 12-42 (West 2007) ("In any action by a consumer against a manufacturer brought in Superior Court . . . a prevailing consumer shall be awarded reasonable attorney's fees, fees for expert witnesses and costs.").

In addition, the Third Circuit failed to include the punitive damages requested by plaintiff in the amount-in-controversy calculation. Although plaintiff clearly requested punitive damages in her complaint, the district court faulted petitioners for failing to identify the "sort of punitive damages" that plaintiff could recover. App. at 23a. This criticism was repeated by the Third Circuit, which added its view that punitive damages would not be available absent allegations of harmful side effects from petitioners' products. App. at 10a. Although it seems incongruous to put the burden of proving plaintiff's entitlement to its requested punitive damages on petitioners, in fact, such damages are not precluded by New Jersey law. *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224 (N.J. 1984). Indeed, the Third Circuit's treatment of this issue diverges from the Seventh Circuit's analysis of the availability of punitive damages in *Oshana*. There, even though the complaint was silent on punitive damages, the Seventh Circuit noted that punitive damages were available under Illinois statute, and that the plaintiff "*could have* amended her state court complaint to seek a punitive damages award." 472 F.3d at 512 (emphasis added). As such, the court concluded that "[r]emoval was proper." *Id.*

Even without properly considering plaintiff's requested injunctive relief, attorneys' fees and punitive damages (and relying on plaintiff's post-removal argument limiting damages to New Jersey) the Third Circuit concluded that petitioners had shown that plaintiff was seeking damages in excess of $4 million. App. at 12a. Plaintiff asserted that the class was likely to be "far larger" than 10,000 members. The court multiplied 10,000 by the full-price cost of only one tube of defendants' product per class member ($135). This result ($4,050,000), trebled per plaintiff's damages request, itself nearly meets the threshold. With proper consideration of the full range of plaintiff's requested relief (nationwide

damages, injunctive relief, punitive damages, and attorney's fees) the aggregate damages easily exceed $5 million.

The court of appeals recognized that "[i]f this court had all the information available to make such a determination, our conclusion here might be that the plaintiff's claim in all likelihood exceeds $5 million." App. at 10a. That sentence should ring alarm bells that something is terribly amiss if federal jurisdiction is denied where "in all likelihood" it exists. Even worse, despite the likelihood that the case belonged in federal court, the Third Circuit remanded to state court without allowing petitioners the opportunity to meet its new "legal certainty" test. This Court should heed the alarm and review the important practical issues in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GARY F. BENDINGER
HOWREY LLP
153 East 53rd St., 54th Floor
New York, N.Y. 10022
(212) 896-6500

JERROLD J. GANZFRIED
Counsel of Record
HOWREY LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

STEPHEN E. NAGIN
NAGIN, GALLOP &
FIGUEREDO, PA
18001 Old Cutler Road
Miami, Florida 33157
(305) 854-5353

KENNETH M. KLIEBARD
DEANNA L. KEYSOR
HOWREY LLP
321 North Clark St., Ste. 3400
Chicago, IL 60610
(312) 595-1239

Attorneys for Petitioners,
Dennis W. Gay, et al.

MAY 2007

APPENDIX

APPENDIX A

PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Civil Action No.: 06-4497

SARAH MORGAN, on behalf of herself
and all others similarly situated,

v.

DENNIS W. GAY; GINA GAY; BASIC RESEARCH, L.L.C.; BAN, L.L.C.; KLEIN-BECKER, USA L.L.C.; COVAXIL LABORATORIES, L.L.C.; CARTER-REED COMPANY, L.L.C., a/k/a The Carter Reed Company; A.G. WATERHOUSE, L.L.C.; ALPHAGENBO TECH, L.L.C.; BODY FORUM, L.L.C.; BODY INNOVENTIONS, L.L.C.; COVARIX, L.L.C.; BYDEX MANAGEMENT L.L.C.; NUTRASPORT, L.L.C.; SOVAGE DERMALOGIC LABORATORIES, L.L.C.; WESTERN HOLDINGS, L.L.C.; GEORGE EVAN BYBE; DANIEL B. MOWREY, PhD; NATHALIE CHEVREAU, PhD; MITCHELL K, FRIEDLANDER; and MICHAEL MEADE,

Appellants.

On Appeal from the United States District Court
for the District of New Jersey
District Court No. 06-cv-01371
District Judge: The Honorable Garrett E. Brown, Jr.

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
November 27, 2006

(Filed: December 15, 2006)

John M. Agnello
Kerrie Heslin
Carella, Byrne, Bain, Gilfillian, Cecchi, Stewart & Ostein
5 Becker Farm Rd.
Roseland, NJ 07068

Christian H. Gannon
Walter H. Swayze, III
Robert J. Kenney
Maria C. Carlucci
Segal McCambridge Singer & Mahoney, LTD.
830 Third Ave., Suite 400
New York, NY 10022

Counsel for Appellants

Jeffrey I. Carton
Jill C. Owens
Meiselman, Denlea, Packman, Carton & Eberz, PC
1311 Mamaroneck Ave.
White Plains, NY 10605

Counsel for Appellee

OPINION

Before: BARRY, SMITH, and NYGAARD, *Circuit Judges*

SMITH, *Circuit Judge.*

I.

This appeal requires us for the first time to interpret certain provisions of the newly-enacted Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.). Specifically, after the defendants removed the case from state court to the District

Court, the plaintiff moved to remand to state court.[1] That motion was granted. Because we agree that the District Court properly placed the burden of proof on the defendants to establish federal subject matter jurisdiction under CAFA, and appropriately determined that the defendants failed to prove that the plaintiff's claims exceeded CAFA's amount in controversy requirement of $5 million, we will affirm.

II.

We repeat verbatim the District Court's recitation of the facts of this case because of its brevity and accuracy:

> This civil action is based upon false advertising claims by New Jersey purchasers of the skin cream StriVectin-SD. Plaintiff asserts violations of the New Jersey Consumer Fraud Act, N.J.C.A. 56:8-1, et seq., as well as claims under common law fraud, unjust enrichment and breach of express and implied warranties. Originally, the instant action was filed as a nationwide class with representatives in New York, Ohio, Indiana, Mississippi, Texas, New Jersey, Illinois and Vermont. Plaintiff's chosen forum for the original Complaint was the United States District Court, Southern District of New York. At that time, Defendants moved to transfer the action to the District of Utah, based upon a related case previously filed in that district and because all Defendants maintained residences and/or principal places of business in Utah. Defendants' venue motion was ultimately granted.

Thereafter, Plaintiff voluntarily dismissed the action and re-filed a modified, New Jersey law-based Complaint in the Superior Court of New Jersey, Law Division, Monmouth County on January 30, 2006. On March 22, 2006, Defendants removed this action pursuant to 28 U.S.C. §§ 1441 and 1453

---

[1] We use the singular version of "plaintiff." The plaintiff is "Sarah Morgan, on behalf of herself and all others similarly situated."

based on federal diversity jurisdiction pursuant to 28 U.S.C. § 1332. On April 20, 2006, Plaintiff filed this Motion to Remand back to New Jersey Superior Court. On May 26, 2006, Defendants moved to transfer the case to the United States District Court, District of Utah (Central Division).

The present Complaint addresses the amount in controversy as follows: "this action seeks . . . trebled compensatory damages; including but not limited to a refund of the purchase price that each member of the class paid for StriVectin-SD; . . . punitive damages; . . . injunction; interest; court costs; and attorneys fees; however, the total amount of such monetary relief for the class as a whole shall not exceed $5 million in sum or value." *Morgan v. Gay*, Civ. No. 06-1371 (GEB), 2006 WL 2265302 at *1 (D.N.J. Aug. 7, 2006).

On August 7, 2006, the District Court granted the plaintiff's motion to remand to state court, concluding that the requisite amount in controversy of $5 million had not been demonstrated. The defendants then timely filed a Petition for Leave to Appeal on August 16, 2006, as well as a motion for a stay of the Remand Order pending appeal. The District Court granted the stay that same day. This Court then granted the defendants leave to appeal. *See Morgan v. Gay*, 466 F.3d 276 (3d Cir. 2006). Pursuant to § 1453(c)(2), we have 60 days from October 16, 2006 to decide the appeal. *See, e.g., Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326-27 (11th Cir. 2006); *Braud v. Transp. Serv. Co. of Illinois*, 445 F.3d 801, 803 n.2 (5th Cir. 2006). *But see Patterson v. Dean Morris, L.L.P.*, 444 F.3d 365, 370 (5th Cir. 2006) (Garza, J., dissenting) (arguing that the plain language of § 1453(c)(2) mandates that the 60 day time limit begin from when the appeal is filed).

III.

We exercise jurisdiction pursuant to 28 U.S.C. § 1453(c). Our standard of review for issues of subject matter juris-

diction is plenary. *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004).

IV.

A.

The first issue we address is whether the District Court properly placed the burden of proof on the defendants to establish federal subject matter jurisdiction under CAFA. The defendants concede that CAFA is silent as to which party bears the burden of proof on the amount in controversy. In an attempt to convince this Court that the burden to establish the amount in controversy falls upon the plaintiff rather than themselves, the defendants focus on the legislative history of CAFA as opposed to the text of the statute.

The defendants are correct that the legislative history indicates that some members of Congress probably wished to switch the burden of proof from the party seeking removal to the party seeking remand. The Senate Judiciary Committee Report (issued ten days after CA FA was signed by the President) states that "[i]f a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)." S. Rep. No. 109-14, at 42 (Feb. 28, 2005), reprinted in 2005 U.S.C.C.A.N. 3, 40. *See also id.* at 44 (noting that "plaintiff should have the burden of demonstrating that 'all matters in controversy' do not (in the aggregate) exceed the sum or value of $5,000,000, exclusive of interest and costs"). Further, this Senate Report states that "new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions be heard in a federal court if properly removed by any defendant." *Id.* at 43. These passages indicate that at least some members of the Senate thought that

CAFA shifts the burden to the party wishing to litigate in state court and, more generally, close cases should fall under federal jurisdiction.

The defendants' reliance on CAFA's legislative history is misplaced, for at least two reasons. First, the actual text of CAFA makes no reference to this burden-shifting legislative history. Prior to the passage of CAFA, the party seeking to remove a case to federal court bore the burden to establish jurisdiction. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these elements."); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990). The text of CAFA does not explicitly address whether it shifts this burden to the party seeking to keep the class action in state court. The Seventh Circuit was the first court of appeals to confront this issue. Writing for a unanimous panel, Judge Easterbrook went so far as to state that "none [of the statute's language] is even arguably relevant" to the burden-shifting inquiry. *Brill v. Countrywide Home Loans. Inc.*, 427 F.3d 446, 448 (7th Cir. 2005). The problem with relying solely on CAFA 's legislative history is that the portion that supports burden-shifting "does not concern any text in the bill that eventually became law."[2]

The only section of CAFA that might be applicable to this debate is its "Findings and Purposes," which broadly indicates an intent by Congress to make federal courts more

---

[2] Judge Easterbrook states his point more forcefully later in the opinion: "But when legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence." *Brill*, 427 F.3d at 448.

available to class action litigants.[3] However, the Findings and Purposes say nothing about burden-shifting, and should not be taken by this Court as an indication that Congress intended to shift a long- and well-established burden. *See Miedema*, 450 F.3d at 1329-30 (rejecting the Findings and Purposes for similar reasons). It should take more than a few lines in a Senate Judiciary Committee Report and some vague language in a statute's "Findings and Purposes" section to reverse the well-established proposition that the party seeking removal carries the jurisdiction-proving burden. Second, and related, as a general matter this Court need not look to legislative history at all when the text of the statute is unambiguous and there is no indication that Congress, for example, made a typographical error in drafting this part of the statute. *Cf. Morgan v. Gay*, 466 F.3d at 279 (stating that. where the "uncontested intent of Congress" shows that the statute contains a typographical error, the court's duty is to make a "common sense revision" to the text of the statute).

While several district courts have shifted the burden from the party seeking removal, no appellate court to date has done so. In addition to the aforementioned Seventh and Eleventh Circuits (in *Brill* and *Miedema*, respectively), the Ninth Circuit has also held that the burden remains with the party seeking removal. *See Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006) (per curiam). We see no reason to create an exception for CAFA to the well-settled practice in removal actions. Accordingly, we join our sister courts of appeals. Under CAFA, the party seeking to remove the case

---

[3] Section 2(b) of CAFA states that "[t]he purposes of this Act are to (1) assure fair and prompt recoveries for class members with legitimate claims"; (2) restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices." 28 U.S.C. § 1711 note.

to federal court bears the burden to establish that the amount in controversy requirement is satisfied.

B.

The second issue we address is whether the District Court appropriately determined that the defendants failed to prove that the plaintiffs claims exceeded CAFA's amount in controversy requirement of $5 million.[4]

1. The Standard: What the Defendants are Required to Prove

The Supreme Court has long held that plaintiffs may limit their claims to avoid federal subject matter jurisdiction. *See, e.g., St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) ("If [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."). CAFA does not change the proposition that the plaintiff is the master of her own claim. *See. e.g., Brill*, 427 F.3d at 449 (noting that "a removing defendant can't make the plaintiff's claim for him; as master of the case, the plaintiff may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold").

There is, however, a broad good faith requirement in a plaintiff's complaint with respect to the amount in controversy. *See Red Cab*, 303 U.S. at 288; *Golden v. Golden*, 382 F.3d 348, 354-55 (3d Cir. 2004). Good faith in this context is entwined with the "legal certainty" test, so that a defendant will be able to remove the case to federal court by "show [ing] to a legal certainty that the amount in controversy

---

[4] The minimal diversity requirement and the minimum number of putative class members requirement of 28 U.S.C. § 1332(d) are not at issue in this appeal. The disputed § 1332(d)(2) requirement in this case is whether the aggregate amount in controversy exceeds $5 million.

exceeds the statutory minimum[.]" *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 398 (3d Cir. 2004).

In the context of CAFA 's statutory minimum of $5 million, one court of appeals squarely addressed how the legal certainty test plays out and one ducked the issue.[5] The Seventh Circuit in *Brill* provides persuasive guidance to this Court on how we should apply the test in the present situation. The *Brill* Court states that, because the plaintiff is the "master of the case" and "may limit his claims . . . to keep the amount in controversy below the threshold," the removing party must "show not only what the stakes of the litigation could be, but also what they are given the plaintiff's actual demands." *Brill*, 427 F.3d at 449. Because "the complaint may be silent or ambiguous on one or more of the ingredients needed to calculate the amount in controversy," "[a] defendant's notice of removal then serves the same function as the complaint would in a suit filed in federal court." *Id.*

Brill and *Samuel-Bassett* provide three main instructions to this Court in the present case: 1) The party wishing to establish subject matter jurisdiction has the burden to prove to a legal certainty that the amount in controversy exceeds the statutory threshold; 2) A plaintiff, if permitted by state laws, may limit her monetary claims to avoid the amount in

---

[5] In *Abrego Abrego*, the Ninth Circuit recognized that this test usually applies in the reverse scenario where a plaintiff alleges damages *in excess* of the federal statutory minimum, so that "remand is warranted only if it appears to a 'legal certainty' that the claim is actually for less than the jurisdictional minimum." 443 F.3d at 683 n.8. However, "[i]f the complaint alleges damages of less than the jurisdictional amount, 'more difficult problems are presented'." *Id.* (quoting 14C Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 3725 at 84). The Ninth Circuit avoided the issue of how the legal certainty test would apply when the plaintiff alleges an amount below the statutory minimum because the plaintiffs did not allege a specific damage amount.

controversy threshold; and 3) Even if a plaintiff states that her claims fall below the threshold, this Court must look to see if the plaintiff's actual monetary demands in the aggregate exceed the threshold, irrespective of whether the plaintiff states that the demands do not. Key to the present matter is that the plaintiff's pleadings are not dispositive under the legal certainty test. This Court's task is to examine not just the dollar figure offered by the plaintiff but also her actual legal claims.

2. The Application of the Standard

If this court had all the information available to make such a determination, our conclusion here might be that the plaintiff's claim in all likelihood exceeds $5 million. Two factors, however, prevent us from agreeing with the defendants. First, the defendants bear the burden to prove to a legal certainty that the complaint exceeds the statutory amount in controversy requirement. Second, there are at least three inconclusive assumptions that the defendants rely upon to meet this burden.

First, the District Court accurately noted that the defendants do not state what sort of punitive damages could be found when no harmful side effects are being alleged. The defendants argue in conclusory fashion that the plaintiff will certainly seek an award of millions of dollars in punitive damages. The defendants then cite this Court's decision in *Golden v. Golden*, 382 F.3d 348 (3d Cir. 2004), for the proposition that a demand for punitive damages will generally satisfy the amount in controversy requirement because it cannot be said to a legal certainty that the value of the plaintiff's claim is below the statutory minimum. This reliance on *Golden* is misplaced. The plaintiffs in *Golden* did not limit their damages as the plaintiff here ostensibly did. Moreover, it was the plaintiffs in *Golden* who sought federal jurisdiction under 28 U.S.C. § 1332. Finally, the defendants simply failed to prove what possible exposure existed with

respect to punitive damages so as to satisfy any portion of the $5 million amount in controversy requirement.

Second, the defendants do not provide information about how much profit from New Jersey sales of StriVectin-SD would be eligible for disgorgement. The defendants respond by arguing that this class action will seek disgorgement of the profits from the nationwide sales of StriVectin-SD rather than just the New Jersey profits. To this end, the defendants submitted an affidavit by Ted J. Galovan, the Chief Financial Officer for Basic Research LLC, one of the defendants in the case. The Galovan Affidavit states that disgorgement from nationwide sales will easily exceed the $5 million amount in controversy requirement.

The plaintiff's initial complaint is at least ambiguous as to whether disgorgement applies to nationwide profits or New Jersey profits. As the defendants note, the plaintiff did not explicitly limit the disgorgement of profits demand to New Jersey sales rather than nationwide sales until her remand reply brief. However, the plaintiff has explicitly limited her claim to disgorgement as a restitutionary remedy, so that the type of disgorgement of profits sought by Morgan cannot extend any further than profits derived directly from sales of StriVectin-SD to the New Jersey class members. *See also Tull v. United States*, 481 U.S. 412, 424 (1987) (stating that "[a]n action for disgorgement of improper profits is . . . a remedy only for restitution"). Based on these considerations, and without stepping into a larger discussion about potential differences between disgorgement and restitution, we are satisfied that disgorgement in the context of this case only applies to profits earned by sales to class members.

Third, but least damaging to the defendants' case, is that, with respect to compensatory damages, the defendants do not provide "statistical sales information regarding the amount of StriVectin-SD sold in New Jersey." *Morgan v. Gay*, 2006 WL 2265302 at *5. Further, the defendants do not state the actual

cost of StriVectin-SD. These two factors do not fatally harm the defendants' position because the plaintiff notes that the size of the class is at least 10,000, and "it is likely to be far larger than that." While StriVectin-SD retailed for $135 for a six ounce tube on the defendants' website (www. strivectin.com), discounts are appar-ently available with the purchase of multiple tubes. However, neither the plaintiff nor the defendants provide information as to the amount of this discount.[6] The defendants want us to multiply 10,000 (the minimum size of the class as alleged by the plaintiff) by $405 (the cost of one bottle at full price trebled, because the plaintiff seeks treble damages). This total amounts to slightly over $4 million. This figure may be too large or too small, depending on both the actual class size and the actual cost of the product to class members. The defendants provide no evidence of the actual price paid for StriVectin-SD by class members.

In sum, the defendants did not carry their burden to show, to a legal certainty, that the amount in controversy exceeds the statutory minimum.[7]

---

[6] There were two discounts available on the StriVectin website as of December 1, 2006: 1) $10 off when a consumer purchases two six-ounce bottles; and 2) once a consumer purchases the first $135 bottle, future bottles cost $108. *See* http://www. strivectin.com/sd/buy-strivectin.php. StriVectin also offers StriVectin-SD Eye Cream, with a 1.3 ounce tube retailing for $59. The website also offers a "100% Money Back Guarantee: If you are not totally satisfied with the significant decrease in the appearance of your existing wrinkles or stretch marks, simply return the unused portion within 30 days for a full, prompt refund, no questions asked!" *Id.*

[7] We note in passing that the defendants' assertion that Sarah Morgan does not have the ability to limit damages of unnamed class members has no merit. The availability of opting out by unnamed class members assuages any concerns that Sarah Morgan's damage limitation harms these other class members. The potential class members in this case will be notified pursuant to New Jersey Court Rules 4:32-1(b)(3) and 4:32-

C.

The final issue that we address is whether the plaintiffs, in state court, will be able to recover more than $5 million in damages even with the express limitation in the complaint. New Jersey follows Federal Rule of Civil Procedure 54(c) with its own Rule 4:42-6, which states that "[e]very final judgment, except final judgments by default, shall grant the relief to which the party in whose favor it is rendered is entitled even though that party has not demanded such relief in the pleadings, provided the parties have been given an adequate opportunity to be heard as to the relief granted." N.J. Ct. R. 4:42-6. *See also* N.J. Ct. R. 4:5-2. As interpreted by the Supreme Court of New Jersey, "[i]t appears universally agreed that the effect of the Rule is to significantly curtail, if not totally neutralize, the binding effect of the specific demand for damages." *Lang v. Baker*, 501 A.2d 153, 158 (N.J. 1985) (per curiam).

Federal Rule of Civil Procedure 54(c) and its state analogs conflict with pre-54(c) cases like *Red Cab, supra*, which permit the plaintiff to be the master of her complaint. As the Fifth Circuit noted, *Red Cab*'s statement that a plaintiff could limit damages to avoid federal court "plainly was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint." *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995).

There is tension, then, between Rule 54(c)/Rule 4:42-6 and the *Red Cab* line of cases. The Supreme Court of New Jersey, in *Lang*, stated that, "[u]nder the Rule, a verdict in excess of the demand is not prohibited unless it would clearly prejudice the opposing party." 501 A.2d at 158. The text of the decision

---

2(b)(2). Under N.J. Ct. R. 4:32-2(b)(2)(E), "the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded."

is ambiguous about whether "the Rule" refers to Fed. R. Civ. P. 54(c) or N.J. Ct. R. 4:42-6, but this ambiguity is of no moment because Rule 4:42-6 was patterned after Rule 54(c)– and *Lang*'s discussion of the two rules does not differentiate between them. To resolve this tension, and in light of *Lang*, we admonish that a verdict in excess of the demand could well be deemed prejudicial to the party that sought removal to federal court when the party seeking remand uses a damages-limitation provision to avoid federal court.[8]

V.

For these reasons, we will *affirm* the judgment of the District Court. The District Court properly placed the burden on the parties seeking removal to prove to a legal certainty that the amount in controversy exceeds the statutory minimum. The defendants in the present matter failed to carry this burden. We do caution, however, that the plaintiffs in state court should not be permitted to ostensibly limit their damages to avoid federal court only to receive an award in excess of the federal amount in controversy requirement.[9]

---

[8] On this point, we agree with the Fifth Circuit's statement in *De Aguilar* that "I these new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading. Such manipulation is surely characterized as bad faith." *See De Aguilar*, 47 F.3d at 1410.

[9] We note the potential availability of judicial estoppel arguments by the defendants should the plaintiffs in the future change legal positions in an attempt to achieve an award in excess of $5 million. The Supreme Court has stated that "several factors typically inform the decision whether to apply that doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a

The plaintiff has made her choice, and the plaintiffs in state court who choose not to opt out of the class must live with it.

---

prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2000) (internal quotations and citations omitted); *United States v. Pelullo*, 399 F.3d 197, 222-23 (3d Cir. 2005); *McCurrie v. Town of Kearny*, 809 A.2d 789, 795 (N.J. 2002) (stating that "judicial estoppel is a doctrine designed to protect the integrity of the judicial process by not permitting a litigant to prevail on an issue and then to seek the reversal of that favorable ruling"); *State of New Jersey Dept. of Law & Public Safety v. Gonzalez*, 667 A.2d 684, 691 (N.J. 1995) (stating that judicial estoppel "bars a party to a legal proceeding from arguing a position inconsistent with one previously asserted") (internal quotation and citation omitted).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 06-1371 (GEB)

Docket Entry #'s 4, 12

SARAH MORGAN,

Plaintiff,

v.

DENNIS W. GAY, *et al.*,

Defendants.

MEMORANDUM OPINION

BROWN, *Chief District Judge*

This matter comes before the Court upon Motions of: (1) Plaintiff Sarah Morgan and others similarly situated (hereinafter "Plaintiff") for an Order remanding this action to the Superior Court of New Jersey, Law Division, Monmouth County, and for attorneys' fees and costs associated with said remand [Docket Entry # 4]; and (2) Defendant Dennis W. Gay, et al. (hereinafter "Defendants") for an Order changing venue and transferring this action to the District of Utah [Docket Entry # 12]. For the reasons discussed in this Memorandum Opinion, issued without oral argument pursuant to Fed. R. Civ. P. 78, Plaintiff's Motion for Remand will be granted and this action will be remanded to the Superior Court of New Jersey, Law Division, Monmouth County. Further, Defendants' Motion to Transfer Venue shall be dismissed as moot.

1. BACKGROUND

This civil action is based upon false advertising claims by New Jersey purchasers of the skin cream StriVectin-SD. (Plaintiff Motion to Remand, p. 3). Plaintiff asserts violations of the New Jersey Consumer Fraud Act, N.J.C.A. 56:8-1, et seq., as well as claims under common law fraud, unjust enrichment and breach of express and implied warranties. (*Id.*).

Originally, the instant action was filed as a nationwide class with representatives in New York, Ohio, Indiana, Mississippi, Texas, New Jersey, Illinois and Vermont. (Defendants' Opposition Brief, p. 3). Plaintiff's chosen forum for the original Complaint was the United States District Court, Southern District of New York. (*Id.*). At that time, Defendants moved to transfer the action to the District of Utah, based upon a related case previously filed in that district and because all Defendants maintained residences and/or principal places of business in Utah. (*Id.*). Defendants' venue motion was ultimately granted. (*Id.*).

Thereafter, Plaintiff voluntarily dismissed the action and re-filed a modified, New Jersey law-based Complaint in the Superior Court of New Jersey, Law Division, Monmouth County on January 30, 2006. (*Id.* at pp. 3, 4; Plaintiff Motion, p. 3). On March 22, 2006, Defendants removed this action pursuant to 28 U.S.C. §§ 1441 and 1453 based on federal diversity jurisdiction pursuant to 28 U.S.C. § 1332. (Plaintiff Motion, pp. 3, 4). On April 20, 2006, Plaintiff filed this Motion to Remand back to New Jersey Superior Court. (Civil Docket). On May 26, 2006, Defendants moved to transfer the case to the United States District Court, District of Utah (Central Division). (*Id.*).

The present Complaint addresses the amount in controversy as follows: "this action . . . seeks . . . trebled compensatory damages; including but not limited to a refund of

the purchase price that each member of the class paid for StriVectin-SD, respectively; punitive damages, and injunction, interest: court costs; and attorneys fees; however, the total amount of such monetary relief for the class as a whole shall not exceed $5 million in sum or value." (Complaint at ¶¶ 6, 8, 66, 71-72, 75 and 84).

II. DISCUSSION

A. Plaintiffs Motion

Plaintiff contends that this Court is without subject matter jurisdiction as Plaintiff's Complaint clearly limited the total monetary relief sought to $5 million or less. As such, Plaintiff contends, Defendants fail to meet the requirements of the Class Action Fairness Act of 2005, which grants federal courts original and removal jurisdiction over any class action or similar case in which the value of all plaintiffs' claims exceeds $5 million, among other specifications. Therefore, Plaintiff asserts, the instant action should be removed to New Jersey State Court.

B. Standard for Removal

Title 28, United States Code, Section 1441 permits a "defendant or defendants" in a civil action filed in state court to remove the action to federal court if the action could have been brought in the federal forum in the first instance. *See Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 840 (1989) (*per curiam*); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 785 (3d Cir. 1995). Removal under 28 U.S.C. § 1441(b) embraces the same class of cases over which the Court would have original subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Propriety of a removal can be challenged in the form of a motion to remand. Once the propriety of removal has been challenged, the removing defendant bears the burden of demonstrating that removal was proper and that the Court has subject matter jurisdiction over the action. *See Dukes v. U.S. Healthcare. Inc.*, 57 F.3d 350, 359 (3d Cir. 1995).

C. Class Action Fairness Act of 2005

On February 18, 2005, Congress enacted the Class Action Fairness Act of 2005 (hereinafter "CAFA"). Pub. L. 109-2, 119 Stat. 4. CAFA applies to most multi-state civil class actions filed on or after the date of enactment, and grants federal courts original and removal jurisdiction over any class action or similar case in which the value of all plaintiffs' claims exceeds $5 million, exclusive of interest and costs, when any of the plaintiffs is a citizen of a different state from any one of the primary defendants and when the number of class members is at least 100. *See* 28 U.S.C. §§ 1332(d)(2) and (d)(5)(B).

Under CAFA, the general rule of nonaggregation for purposes of determining the amount in controversy has been eliminated. However, questions regarding who carries the burden of proof in a motion to remand under CAFA exist, with courts having considered the issue split and many courts, including the Third Circuit Court of Appeals, not yet having an occasion to address it. *See e.g. Waitt v. Merck & Co., Inc.*, 2005 WL 1799740 at *3 (W.D. Wash. July 27, 2005) (holding that the burden of proof rests with the party seeking remand); *Harvey v. Blockbuster, Inc.*, 384 F.Supp. 2d 749, 752 (D.N.J. 2005) (recognizing that CAFA places the burden of remand on the plaintiff but not applying CAFA for other reasons); and *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005); *Antonio Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 685 (9th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006) (all holding that the burden remains with the removing party).

D. Burden of Proof Under CAFA

A review of the CAFA statute reveals an absence of any language addressing which party is to carry the burden of proof. However, CAFA's legislative history, specifically the report of the Senate Judiciary Committee, contains the fol-

lowing language: "[I]f a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional provisions are not satisfied)." S. Rep. 14, 109th Cong. 1st Sess. 42 (2005).

Courts often turn to legislative history when a statute or provision thereof is ambivalent, and with regards to instant burden of proof issue, several have done just that. *See e.g. Berry v. American Express Publishing Corp.*, 381 F.Supp. 2d 1118 (C.D.Cal. 2005) and *Natale v. Pfizer, Inc.*, 379 F.Supp. 2d 161 (D.Mass).

Several district courts have relied upon CAFA's legislative history to shift the burden of proof. However, each circuit court that has had occasion to consider the issue has determined that the burden of proof was to remain with the removing party, relying upon prior holdings that legislative history has no legal effect, that declarations of individual Senators cannot alter longstanding precedent, and that if Congress intended to alter who carries the burden of proof it would have so stated in the CAFA statute. *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005); *Antonio Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 685 (9th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006).

In consideration of the foregoing, this Court is inclined to agree with the holdings of the Seventh, Ninth and Eleventh Circuits. There is nothing in the CAFA statute indicating that Congress intended to alter which party carries the burden of proof. Further, legislative statements found in the Senate Judiciary Committee report accompanying the CAFA statute are inadequate in force or effect to alter years of precedent. *Pierce v. Underwood*, 487 U.S. 552, 556-68 (1988); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 359 (3d Cir. 1995).

This Court therefore holds that under CAFA the burden of establishing removal jurisdiction remains on the proponent of federal jurisdiction, following the rationale set forth by the Seventh, Ninth and Eleventh Circuits.

E. Amount In Controversy Requirement Pursuant to CAFA

Plaintiff does not dispute subject matter jurisdiction regarding the number of putative class members nor with the diversity of citizenship. Rather, Plaintiff argues that they properly capped the amount of damages sought to no more than $5 million, thereby failing under CAFA to satisfy the amount in controversy requirement and eliminating federal subject matter jurisdiction.

Defendants disagree and argue several points, including: (1) a suggestion that Plaintiff is engaging in "arrant forum shopping through evasive pleading"; (2) that the civil action has "nationwide focus" despite Plaintiff's narrowing its second Complaint to a class of New Jersey residents; and (3) that the jurisdictional amount in controversy under CAFA is "clearly satisfied." Defendants support their final assertion by arguing that the aggregated amount in controversy exceeds a "disingenuously" asserted $5 million cap on damages that Plaintiff placed in their Complaint. Defendants point to Plaintiff's demands for disgorgement of all profits from the sale of StriVectin-SD, as well as punitive and compensatory damages and attorneys' fees and costs, and assert that these demands exceed the $5 million mark.

i. *standard of proof*

The Defendants, as previously determined to bear the burden of proof in the instant matter, must support their assertions of federal subject matter jurisdiction "by a preponderance of the evidence." *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178 (1936); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1330 (11th Cir. 2006). The

preponderance of the evidence standard is commonly rephrased as "more likely than not." *Penn v. Wal-Mart Stores, Inc.*, 116 F.Supp. 2d 557 (D.N.J. 2000). Further, the rule of the Third Circuit states that the removing party bears the burden of demonstrating to a "legal certainty" the propriety of removal (*Samuel Bassett v. Kia Motors of Am., Inc.*, 357 F.3d 392, 398 (3d Cir. 2004)) and that any doubts by a court should be resolved in favor of remand (*Batoff v. State Farm Insurance Co.*, 977 F.2d 848, 851 (3d Cir. 1992)).

ii. *evidence*

When considering the amount in controversy, the Court is to look to the face of the complaint as those asserted allegations control the amount in controversy unless it appears "to a legal certainty the claim is really for less than the jurisdictional amount . . ." *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938).

The legal certainty standard is a modest standard when a plaintiff wishes to litigate in federal court. However, as here, when a plaintiff wishes to be in state court, the complaint may contain ambiguities which require further analysis. In such a situation, "a defendant's notice of removal then serves the same function as the complaint would in a suit filed in federal court." *Brill v. Countrywide Home Loans. Inc.*, 427 F.3d 446, 449 (7th Cir. 2005). "The complication is that a removing defendant cannot make the plaintiff's claims for him; as master of the case, the plaintiff may limit his claims . . . to keep the amount in controversy below the threshold. Thus part of the removing party's burden is to show not only what the stakes of the litigation could be, but also what they are given the plaintiff's actual demands." (*Id.*) (Emphasis in the original).

Here, the Court is convinced, to a legal certainty, that the recovery Plaintiff potentially will receive will not exceed $5 million as Plaintiff has capped her potential recovery to

that amount. Whether or not Plaintiff's cap is a "disingenuous" effort to avoid federal jurisdiction, limits on recovery are nevertheless a legitimate and recognized practice. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) ("If he [plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more the defendant cannot remove"); *see also* 14B C. Wright & Miller, *Federal Practice and Procedure*, § 3702 at 46 (3d ed. 1998) ("[u]nder well-settled principles, the plaintiff is the master of his or her own claim; if plaintiff chooses to ask for less than the jurisdictional amount, only the sum actually demanded is in controversy").

Having completed the review of Plaintiff's Complaint, the Court next considers the proofs offered by Defendants in their submissions. As discussed *infra*, Defendants assert that Plaintiff's demands for disgorgement of all profits from the sale of StriVectin-SD, as well as punitive and compensatory damages and attorneys' fees and costs, far exceed the $5 million mark.

Defendants, however, do not offer any factual support for this assertion. They do not provide, for example, statistical sales information regarding the amount of StriVectin-SD sold in New Jersey, the cost of StriVectin-SD, what sort of punitive damages that could be found when no harmful side effects are being alleged, or how much profit was made in New Jersey sales of StriVectin-SD which would be eligible for disgorgement. Without this information, all that remains from Defendants' submissions are their unsubstantiated assertions. However, Plaintiff provides the Court concrete evidence that the most Plaintiff can obtain from her Complaint in judgment is $5 million, as stated several times in her Complaint.

As Defendants have provided insufficient information to carry their burden of proof, and Plaintiff has provided tangi-

ble evidence that any financial award may not exceed $5 million, this Court finds that the instant civil action must be remanded to New Jersey Superior Court as it fails to meet the monetary requirements of CAFA.[1]

F. Motion to Transfer Venue is Moot

The instant Motion for Remand was filed on April 20, 2006, more than a month prior to Defendants' Motion to Transfer Venue. As is customary, the Court follows a "first in time, first in right" protocol. As the determination of this Court ultimately requires the remand of this action to New Jersey Superior Court, Defendants subsequent Motion to Transfer Venue to the District of Utah is moot.

G. Plaintiff's Request for Attorneys' Fees and Costs

Plaintiff requests attorneys' fees and costs associated with the removal and remand. Plaintiff argues that attorneys' fees and costs are appropriate here as Defendants had no "colorable basis or justification for removing this case where the plaintiff explicitly limited the amount in controversy . . ." (Plaintiff's Motion, p. 16).

28 U.S.C. § 1447(c) provides, in relevant part: "[A]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal . . ." Commentary accompanying the referenced statutory provision states that "[T]he matter (of whether to award costs and attorney fees) is left to the court's dis-

---

[1] The Court is aware of the procedural history that precedes the Complaint and Motions before it, and takes note of Defendants allegations of "forum shopping". Nevertheless, there is nothing in law that prevents or invalidates the previous actions of Plaintiff. Further, the Court is required to look not at previous complaints that have been properly dismissed, or at potential future actions that may be filed against Defendants regarding their product, but rather, what is currently before it which is the presently filed Complaint limiting the scope of liability to New Jersey residents who had purchased StriVectin-SD.

cretion, to be exercised based on the nature of the removal and the nature of the remand." The Third Circuit Court of Appeals has continued to proclaim the flexibility district courts maintain under the statutory language of § 1447. *Mints v. Educational Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996) (holding that district courts have "broad discretion and may be flexible in determining whether to require the payment of fees under section 1447(c)"). However, the United States Supreme Court has recently determined that "[a]bsent unusual circumstances, courts may award attorney's fees under 28 U.S.C. § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital*, 126 S.Ct. 704 (2005).

Here, it cannot be said that Defendants lacked an "objectively reasonable basis" when it removed the instant civil action to federal court. Defendants argued that the $5 million cap was "disingenuous" and that without the cap, the damages requested would exceed said dollar mark. To exceed the mark would satisfy the CAFA requirements, thereby giving the federal courts subject matter jurisdiction over the matter. The theory is sound, and if so proven, would have supported removal. Therefore, Defendants presented an "objectively reasonable basis" with which to remove (*see Mints* at 1261) and attorney fees and costs are not suitable for award.

III. CONCLUSION

For the reasons discussed above, Plaintiff's Motion to Remand will be granted and this action is remanded to the Superior Court of New Jersey, Law Division, Monmouth County [Docket Entry # 4]. Consequently, Defendants' Motion to Transfer Venue [Docket Entry # 12] will be denied as moot. An appropriate Order is filed herewith.

/s/ Garrett E. Brown, Jr.
HONORABLE GARRETT E. BROWN, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Dated: August 7th, 2006

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No: 06-4497

SARAH MORGAN, on behalf of herself
and all others similarly situated

v.

DENNIS W GAY; GINA GAY; BASIC RESEARCH, L.L.C.; BAN, L.L.C.; KLEIN-BECKER, USA L.L.C.; COVAXIL LABORATORIES, L.L.C.; CARTER-REED COMPANY, L L.C. , a/k/a THE CARTER-REED COMPANY; A.G. WATERHOUSE, L.L.C.; ALPHAGENBO TECH, L.L.C.; BODY FORUM, L.L.C.; BODY INNOVENTIONS, L.L.C.; COVARIX L.L.C.; BYDEX MANAGEMENT, L.L.C.; NUTRASPORT, L.L.C.; SOVAGE DERMALOGIC LABORATORIES, L.L.C.; WESTERN HOLDING, L.L.C.; GEORGE EVAN BYBEE; DANIEL B. MOWREY, Ph.D; NATHALIE CHEVREAU, Ph.D; MITCHELL K. FRIEDLANDER; MICHAEL MEADE,

Appellants

SUR PETITION FOR PANEL REHEARING

Present: BARRY, SMITH, and NYGAARD, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

BY THE COURT:

/s/ D. Brooks Smith
Circuit Judge

DATED: February 2, 2007

tyw/cc:

John M Agnello, Esq.
Maria C. Carlucci, Esq.
Christian H. Gannon, Esq.
Kerrie R. Heslin, Esq.
Walter H. Swayze III, Esq.
Jeffrey I. Carlton, Esq..
Jill C. Owens, Esq.
Robert J. Kenney, Esq.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No.: 06-4497

SARAH MORGAN, on behalf of herself
and all others similarly situated,

v.

DENNIS W. GAY; GINA GAY; BASIC RESEARCH, L.L.C.; BAN, L.L.C.; KLEIN-BECKER, USA L.L.C.; COVAXIL LABORATORIES, L.L.C.; CARTER-REED COMPANY, L.L.C., a/k/a The Carter Reed Company; A.G. WATERHOUSE, L.L.C.; ALPHAGENBO TECH, L.L.C.; BODY FORUM, L.L.C.; BODY INNOVENTIONS, L.L.C.; COVARIX, L.L.C.; BYDEX MANAGEMENT L.L.C.; NUTRASPORT, L.L.C.; SOVAGE DERMALOGIC LABORATORIES, L.L.C.; WESTERN HOLDINGS, L.L.C.; GEORGE EVAN BYBE; DANIEL B. MOWREY, PhD; NATHALIE CIIEVREAU, PhD; MITCHELL K, FRIEDLANDER; and MICHAEL MEADE,

Appellants.

On Appeal from the United States District Court
for the District of New Jersey
District Court No. 06-cv-01371
District Judge: The Honorable Garrett E. Brown, Jr.

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
November 27, 2006

Before: BARRY, SMITH, and NYGAARD, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted on November 27, 2006. On consideration thereof, it is now ORDERED and ADJUDGED that the judgment of the District Court entered on August 7, 2006, be and the same hereby is AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron

Dated: December 15, 2006

APPENDIX E

109th CONGRESS
1st Session

S.5

AN ACT

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Class Action Fairness Act of 2005".

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.

Sec. 2. Findings and purposes.

Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.

Sec. 4. Federal district court jurisdiction for interstate class actions. Sec. 5. Removal of interstate class actions to Federal district court. Sec. 6. Report on class action settlements.

Sec. 7. Enactment of Judicial Conference recommendations.

Sec. 8. Rulemaking authority of Supreme Court and Judicial Conference.

Sec. 9. Effective date.

SEC. 2. FINDINGS AND PURPOSES.

(a.) FINDINGS.—Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers

of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States arid bind the rights of the residents of those States.

(b) PURPOSES.—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) IN GENERAL.—Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114—CLASS ACTIONS

"Sec.

"1711. Definitions.

"1712. Coupon settlements.

"1713. Protection against loss by class memebers.

"1714. Protection against discrimination based on geographic location.

"1715. Notifications to appropriate Federal and State officials.

"§ 1711. Definitions

"In this chapter:

"(1) CLASS.—The term 'class' means all of the class members in a class action.

"(2) CLASS ACTION.—The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

"(3) CLASS COUNSEL.—The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

"(4) CLASS MEMBERS.—The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(5) PLAINTIFF CLASS ACTION.—The term 'plaintiff class action' means a class action in which class members are plaintiffs.

"(6) PROPOSED SETTLEMENT.—The term 'proposed set-tlement' means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.

"§ 1712. Coupon settlements

"(a) CONTINGENT FEES IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for a recovery

of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that areredeemed.

"(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS.—

"(1) IN GENERAL.—If a proposed settlement in a class action provides for a, recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

"(2) COURT APPROVAL.—Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

"(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief—

"(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

"(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

"(d) SETTLEMENT VALUATION EXPERTISE.—In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a. witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

"(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS.—In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

"§ 1713. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

"§ 1714. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

"§ 1715. Notifications to appropriate Federal and State officials

"(a) DEFINITIONS.—

"(1) APPROPRIATE FEDERAL OFFICIAL.—In this section, the term 'appropriate Federal official' means—

"(A) the Attorney General of the United States; or

"(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a, foreign hank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) APPROPRIATE STATE OFFICIAL.—In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject, to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

"(b) IN GENERAL.—Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a

class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

"(2) notice of any scheduled judicial hearing in the class action;

"(3) any proposed or final notification to class members of—

"(A)(i) the members' rights to request exclusion from the class action; or

"(ii) if no right to request exclusion exists, a statement that no such right exists; and

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement;

"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

"(6) any final judgment or notice of dismissal;

"(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate f the number of class members residing in each state and the estimated proportionate share of the claims of such members to the entire settlement; and

"(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

"(c) DEPOSITORY INSTITUTIONS NOTIFICATION—

"(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS. —In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) STATE DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a State depository institution (as that term is defined in section 3 f the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

"(d) FINAL APPROVAL.—An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

"(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED.—

"(1) IN GENERAL.—A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

"(2) LIMITATION.—A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (h) was directed to the appropriate Federal official arid to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

"(3) APPLICATION OF RIGHTS.—The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

"(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

"114. Class Actions ..... 1711".

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.—Section 1332 is amended—

(1) by redesignating subsection (d) as sub-section (e); and

(2) by inserting after subsection (c) the following:

"(d) (1) In this subsection-

"(A) the term 'class' means all of the class members in a class action;

"(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

"(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

"(D) the term 'class members' means the per-sons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

"(A) whether the claims asserted involve matters of national or interstate interest;

"(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

"(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

"(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

"(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

"(F) whether, during the 3-year period pre-ceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

"(4) A district court shall decline to exercise jurisdiction under paragraph (2) —

"(A)(i) over a class action in which—

"(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

"(II) at least 1 defendant is a defendant—

"(aa) from whom significant relief is sought by members of the plaintiff class;

"(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

"(cc) who is a citizen of the State in which the action was originally filed; and

"(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

"(ii) (during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

"(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

"(5) Paragraphs (2) through (4) shall not apply to any class action in which—

"(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

"(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

"(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal ,jurisdiction, as of the (late of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal ,jurisdiction.

"(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

"(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

"(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

"(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

"(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it other-wise meets the provisions of those paragraphs.

"(B)(i) As used in subparagraph (A), the term 'mass action' means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

"(ii) As used in subparagraph (A), the term 'mass action' shall not include any civil action in which—

"(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

"(II) the claims are joined upon motion of a defendant;

"(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

"(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

"(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

"(ii) This subparagraph will not apply—

"(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

"(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

"(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.".

(b) CONFORMING AMENDMENTS.—

(1) Section 1335(a) (1) is amended by inserting "subsection (a) or (d) of" before "section 1332".

(2) Section 1603(b)(3) is amended by striking "(d)" and inserting "(e)".

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

"§ 1453. Removal of class actions

"(a) DEFINITIONS. —In this section, the terms 'class', 'class action', 'class certification order', and 'class member' shall have the meanings given such terms under section 1332(d)(1).

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(h) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

"(c) REVIEW OF REMAND ORDERS.—

"(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was re-moved if application is made to the court of appeals not less than 7 days after entry of the order.

"(2) TIME PERIOD FOR JUDGMENT.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 (lays after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

"(3) EXTENSION OF TIME PERIOD.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

"(A) all parties to the proceeding agree to such extension, for any period of time; or

"(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

"(4) DENIAL OF APPEAL.—If a final judgment on the appeal under paragraph (1) is not issued be-fore the end of the period described in paragraph (2), including

any extension under paragraph (3), the appeal shall be denied.

"(d) EXCEPTION.—This section shall not apply to any class action that solely involves—

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as de-fined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions.".

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL.—Not later than 12 months after the (late of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall pre-pare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT.—The report under subsection (a) shall contain—

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that—

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS.—Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE RECOMMENDATIONS.

Notwithstanding any other provision of law, the amendments to rule 23 of the Federal Rules of Civil Procedure, which are set forth in the order entered by the Supreme Court of the United States on March 27, 2003, shall take effect on the (late of enactment of this Act or on December 1, 2003 (as specified in that order), which-ever occurs first.

SEC. 8. RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE.

Nothing in this Act shall restrict in any way the authority of the Judicial Conference and the Supreme Court to propose and prescribe general rules of practice and procedure under chapter 131 of title 28, United States Code.

SEC. 9. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

Passed the Senate February 10, 2005.

Attest:

Secretary.

APPENDIX F

SUPERIOR COURT OF THE STATE OF NEW JERSEY
LAW DIVISION COUNTY OF MONMOUTH

[Filed JAN. 30, 2006]

Civil Action No. MON-L-556-06

SARAH MORGAN, on behalf of herself and all others similarly situated,

Plaintiff,

v.

DENNIS W. GAY, GINA GAY, BASIC RESEARCH, L.L.C., BAN, L.L.C., KLEIN-BECKER, USA L.L.C., COVAXIL LABORATORIES, L.L.C., CARTER-REED COMPANY, L.L.C., a/k/a The Carter Reed Company, A.G. WATERHOUSE, ALPHAGENBO TECH, L.L.C., BODY FORUM, L.L.C., BODY INNOVENTIONS, L.L.C., COVARIX, L.L.C., BYDEX MANAGEMENT L.L.C., NUTRASPORT, SOVAGE DERMALOGIC LABORATORIES, L.L.C., WESTERN HOLDINGS, L.L.C., GEORGE EVAN BYBEE, DANIEL B. MOWREY, PhD, NATHALIE CHEVREAU, PhD, MITCHELL K, FRIEDLANDER and MICHAEL MEADE,

Defendants.

CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED

Plaintiff Sarah Morgan, as and for her complaint, alleges, with personal knowledge as to her own actions, and upon information and belief as to those of others, as follows:

Nature of this Case

1 This action seeks to redress the pervasive pattern of fraudulent, deceptive, and otherwise improper marketing and

advertising that defendants are engaging in with respect to their wildly successful topical cream preparation, StriVectin-SD. Defendants began marketing StriVectin-SD in or about July 2002 as a stretch-mark repair cream, and just six months later, defendants began also to market the same product as a "miracle" and "breakthrough" cream for eliminating facial wrinkles. Beginning in or about January 2003, defendants first started to claim that because purchasers of the stretch mark cream had passed it along to friends and family and the advertising message had became muddled, people started to apply the cream on their faces and around their eyes because they found it eliminated facial fine lines, wrinkles and "crow's feet" Since then, over the course of the past three years, defendants have knowingly engaged in a deliberate campaign of widespread fraud and deceit intended to coax unsuspecting consumers into purchasing millions of dollars worth of the StriVectin-SD they have marketed,

2. StriVectin-SD is said in defendants' pervasive, deceptive advertising, to "make your skin look younger, healthier and more vibrant." Defendants also promise, "[a] smoother, younger complexion, with less irritation and faster results—all without expensive (and painful) peels, implants or injections." Additionally, defendants falsely claim that StriVectin-SD improves "the appearance of acne scars, burn scars, chicken pox marks, scars from old injuries, etc."

3. According to defendants, the cream is "clinically proven to be safe and effective," "nothing short of a miracle" and that it can "help give you a youthful, healthy, glowing complexion faster than retinol, far superior to vitamin C." In fact, defendants' claims are unsupportable and untrue

4. Defendants' advertising—which saturates print publications and the Internet—is littered with defendants' false claims that the product is *clinically proven* to achieve benefits including, but not limited to "wrinkle reduction" Such advertising is blatantly deceptive, however, because the product is

not itself subjected to clinical trials, (*i.e.*, double-blinded, placebo-controlled studies in large numbers of humans, which is the hallmark of a sound scientific study) Rather, defendants' advertising claims are predicated upon highly selective and manipulated references to arcane and limited studies of one or more of the ingredients contained in the cream and are never based upon a full scale testing of the product itself. Defendants hide the fact that neither they nor anyone else has ever legitimately studied the effect of the various *combinations* of ingredients they indiscriminately mix together in their product. Such marketing is fraudulent and deceptive.

5. This fraudulent and deceptive activity has not gone unnoticed by government regulators. In early 2005 the United States Food and Drug Administration ("FDA") issued an amended warning letter to defendants regarding their advertising claims about the alleged stretch mark and wrinkle reducer StriVectin-SD, as well as two other of defendants' large stable of products.

6. This fraudulent, deceptive activity by the interrelated defendant companies and individuals entitles the plaintiff, a purchaser of StriVectin-SD, to relief under the New Jersey Consumer Fraud Act ("Consumer Fraud Act") as well as under the laws of the state of New Jersey governing fraud, unjust enrichment and breach of warranty. Plaintiff brings this action on behalf of a class of New Jersey residents who purchased and StriVectin-SD. It seeks, *inter alia*, trebled compensatory damages; including but not limited to a refund of the purchase price that each member the class paid for StriVectin-SD, respectively; punitive damages, an injunction, interest; court costs; and attorneys' fees; however, the total amount of such monetary relief for the class as a whole shall not exceed $5 million in sum or value.

JURISDICTION

7. This Court has jurisdiction over this action pursuant the Consumer Fraud Act, N.J.S.A. 56: 8-1 *et seq.* and the

common law. Defendants do actual business throughout the State of New Jersey, including through sale of their product StriVectinSD in retail stores throughout the State, in print and other advertising seen throughout the State, and by maintenance of an interactive website accessible to consumers in and residents of the State, and through which StriVectin-SD can be purchased directly.

8. Federal diversity jurisdiction is lacking because the unaggregated amount in controversy is not sufficient to satisfy 28 U.S.C. § 1332(a) and the aggregated amount in controversy is not sufficient to satisfy 28 U.S.C. § 1332(d)(2) because the plaintiff class does not seek and will not accept recovery the sum or value of which exceeds $5,000,000

VENUE

9. Venue is proper in this District pursuant to N J Ct.. R. 4:3-2 because plaintiff Sarah Morgan, a StriVectin-SD purchaser, resides in Monmouth County, New Jersey and was exposed to defendants' advertising in Monmouth County and because defendants actually advertise and do business in Monmouth County.

PARTIES

Plaintiff

10. Plaintiff is a citizen and resident of Red Bank, New Jersey who was deceived into purchasing StriVectin-SD as a result of defendants' fraudulent, misleading, and false advertising and claims about their product. In or about April 2004, based on defendants' print and internet advertising, Ms. Morgan purchased a tube of StriVectin-SD and used it for approximately 8 months without seeing any improvement to her facial wrinkles.

Defendants

11. Defendant Basic Research, L.L.C. ("Basic Research") is a limited liability company established under the laws of

the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116.

12. Defendant Ban, L.L.C. ("Ban") is a limited liability company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116.

13. Defendant Klein-Becker USA, L.L.C. ("Klein-Becker") is a limited liability company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116.. Klein-Becker is described by defendants on the StriVectin website as the exclusive distributor for Klein-Becker.

14. Defendant Covaxil Laboratories, L.L.C. ("Covaxil") is a limited liability company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116

15. Defendant Carter-Reed Company, L.L.C., a/k/a The Carter-Reed Company ("Carter-Reed"), is a limited liability company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116

16. Defendant A.G. Waterhouse, L.L.C. ("A.G. Waterhouse") is a limited\ liability company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116.

17. Defendant Alphagenbo Tech, L.L.C. ("Alphagenbo") is a limited liability company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116

18. Defendant Body Forum, L.L.C. ("Body Forum") is a limited liability company established under the laws of the

State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116

19. Defendant Body Innoventions, L.L.C. ("Body Innoventions") is a limited liability company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116.

20. Defendant Covarix, L.L.C. ("Covarix") is a limited liability company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116..

21. Defendant Bydex Management, L.L.C. ("Bydex") is a limited liability company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116.

22. Defendant Nutrasport, L.L.C. is a limited liability company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116

23. Defendant Savage Dermalogic Laboratories, L.L.C. is a company established under the laws of the State of Utah, with its principal place of business at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116..

24. Defendant Western Holdings, L.L.C. ("Western Holdings") is a limited liability company established under the laws of the State of Wyoming, with its principal place of business at 1210 South Walnut, Casper, Wyoming 82601. The defendants use this company to register with the United States Patent and Trademark Office creative names for StriVectin-SD and other products that lack clinical efficacy.

25. The interrelationships of the defendant companies is evidenced by the fact that almost all of them occupy the same

office address at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116.

26. Defendant Dennis W. Gay is a citizen and resident of the State of Utah, with a residence at 748 East 200 South, Payson, Utah 84651. Defendant Dennis Gay is an officer and a principal shareholder of, among other companies, defendants Basic Research, Ban, Klein-Becker, Covaxil, Carter-Reed, A. G. Waterhouse, Alphagenbo, Body Forum, Body Innoventions, Covarix, Bydex, Nutraport, Savage and Western Holdings. Dennis Gay is personally responsible for the advertising and dissemination of the various deceptive information used in his companies' advertising.. His intentional tortious acts and personal participation in the wrongful conduct underlying this action deprive him of any protection he might otherwise have for his personal liability under the corporate shield doctrine or otherwise.

27. Moreover, in connection with the manufacture, marketing, advertising, promotion, distribution, and sale of StriVectin-SD, Dennis Gay has exercised complete dominion and control over Basic Research, Ban, Klein-Becker, Covaxil, Carter-Reed, AG Waterhouse, Alphagenbo, Body Forum, Body Innoventions, Covarix, Bydex, Nutrasport, Sovage and Western Holdings, such that these companies are his alter ego, a sham, facade, and mere instrumentality for his personal benefit, and he has disregarded and abused the corporate form and structure of the companies.

28. Furthermore, Dennis Gay has purposely misused the corporate form of Basic Research, Ban, Klein-Becker, Covaxil, Carter-Reed, AG Waterhouse, Alphagenbo, Body Forum, Body Innoventions, Covarex, Bydex, Nutrasport, &Wage and Western Holdings to commit an intentional fraud upon the public, and in an effort to defeat the ends of justice and otherwise evade the law, including with respect to the manufacture, marketing, advertisement, promotion, distribution, and sale of StriVectin-SD.

29. Defendant George Evan Bybee is a citizen and resident of the state of Utah with a business address at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116. Upon information and believe, Bybee is among the principal shareholders of one or more of the defendant companies.

30. Defendant Daniel B. Mowrey, is a citizen and resident of the state of Utah, with a business address at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116. "Dr." Mowrey is described in Klein Becker promotional material as "Director of Scientific Affairs" for defendants, and as discussed in detail below, actively represents and promotes StriVectin-SD on defendants' website, www.StriVectin.com Mowrey, who is not a medical doctor, but rather, upon information and belief is a psychologist, is from time-to-time identified in product advertising just as "Dr. Daniel B. Mowrey" and is pictured, deceptively, in defendants advertising wearing a "lab coat" suggesting a medical or biology background that he does not possess Mowrey's intentional tortious acts and personal participation in the wrongful conduct underlying this action, as described below, deprive him of any protection he might otherwise have for his personal liability under the corporate shield doctrine or otherwise.

31. Defendant Gina Gay, is a citizen and resident of the State of Utah, with a business address of 5742 W Harold Gatty Drive, Salt Lake City, Utah 84116.. Ms. Gay is employed by the corporate defendants in a marketing capacity and is described on the StriVectin website as the "spokesperson" for Klein-Becker, StriVectin-SD's exclusive distributor. As discussed below, Ms. Gay actively promotes StriVectin-SD in defendants' print and Internet advertising.

32. Defendant Nathalie Chevreau, is a citizen and resident of the State of Utah, with a business address at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116. "Dr." Chevreau is said to be the "Director of Women's Health and

Nutrition" for defendants, and, as discussed below, promotes and represents StriVectin-SD on defendants' website, www.StriVectin.com. Chevreau, who is *not* a medical doctor, too was a subject of the Congressional Committee on Energy and Commerce's investigation, and gave testimony before that Committee. Chevreau's intentional tortious acts and personal participation in the wrongful conduct underlying this action deprive her of any protection she might otherwise have for her personal liability under the corporate shield doctrine or otherwise

33. Defendant Mitchell K. Friedlander is a citizen and resident of the State of Utah with a business address at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116 Defendant Friedlander is the marketing consultant for defendant Basic Research, StriVectin-SD's distributor.

34. Defendant Michael Meade is a citizen and resident of the State of Utah with a business address at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116.. Defendant Meade is the Director of Operations for defendant Basic Research.

Operative Facts

35. This action by a New Jersey class of consumers of defendants' product, StriVectin-SD, seeks to recover for defendants' fraud and deception of consumers with respect to the StriVectin-SD product, The product is a purported "stretch-mark" reducing cream that consumers are also encouraged to use on their face to reduce lines and wrinkles in a manner touted possibly to be "Better than Botox?" Some illustrative examples of defendants' deceptive marketing of the product are set forth in the paragraphs below.

36. In or about July 2002, defendants began marketing, advertising, promoting, distributing, and selling a new topical cream preparation, StriVectin-SD, which defendants said was backed by clinical trials documenting its ability to visibly

reduce the depth, length, discoloration and roughness of existing stretch marks."

37. Then, beginning in approximately January 2003, defendants' magazine and other advertising started to tell the story of this preexisting stretch mark cream that had allegedly been backed by unidentified clinical trials that during market research, people began to use as a facial moisturizer because it was simply labeled "topical cream " According to defendant Gina Gay, (identified as spokesperson for defendant Klein-Becker, StriVectin-SD's exclusive distributor), who is quoted in the advertising, the success of StriVectin-SD as an anti-wrinkle cream was "dumb luck." According to Ms, Gay, feedback from users that it made them "look 10 years younger" made them realize that they "had something more than America's most effective stretch-mark cream "

38. Defendant Mowrey represents in the advertising that people were seeing results using the stretch mark cream as a wrinkle-reducer but they were lacking the scientific explanation why, Then, in an occurrence of "dumb luck," a clinical study presented at the 20th World Congress of Dermatology in Paris, France in July 2002 revealed the answer: the superior effectiveness as a wrinkle reducer of a "patented oligo-peptide (called Pal-KTTKS) as compared with retinol, vitamin C and a placebo,. Mowrey explains that "the wrinkle-reducing oligo-peptide tested in the breakthrough clinical trials turned out to be a key ingredient in the StriVectin cream"

39. Defendants' interactive internet website, www. strivectin.com—through which Strivectin-SD can be purchased directly by anyone, including New Jersey residents—contains numerous false and deceptive statements about the purported, but in fact utterly untrue and unsubstantiated, benefits of StriVectin-SD. For instance, in addition to the statements such as those noted above, defendants offer testimonials from defendant Chevreau falsely describing

StriVectin-SD as being able to reduce "the kind of fine lines, wrinkles and crows' feet that can add 10-15 years to your appearance, and which costly medical treatments often leave behind skin-care professionals have been recommending, and using, StriVectin," In fact, StriVectin-SD does nothing of the sort, and such statements have no basis in any legitimate, credible scientific evidence.

40. A consumer who visits defendants' interactive website can follow a link entitled, "Clinical Studies" which leads to a page entitled "Clinical Studies Don't Lie," where defendants claim the following:

> A groundbreaking series of studies has demonstrated, without a doubt, the amazing effectiveness of StriVectin-SD's ® functional isolates After reviewing and verifying the clinical data, an incredible 93% of subjects saw a significant, visible reduction in the appearance of stretch marks. The unequivocal, verified results speak for themselves. But there's more Clinical observations further document the ability of StriVectin-SD's independent isolates to dramatically improve the appearance of:
>
> - Indented surfaces
> - Smooth surfaces
> - Skin firmness
> - Irregularities in skin discoloration.

41. In fact, there is no sound scientific basis (*i.e.* a true clinical study) that StriVectin-SD itself either reduces the depth, length, discoloration or roughness of existing stretch marks, diminishes the appearance of fine lines, wrinkles and crow's feet, or improves the appearance of acne scars, burn scars, chicken pox marks, scars from old injuries, etc. Defendants do not: (1) identify any of the actual clinical studies purportedly demonstrating StriVectin-SD's effectiveness; (2) point the consumer to the clinical study or studies

containing the clinical data they purport to have reviewed and "verified;" (3) explain the verification process; or (4) explain the process by which their statistical figures are derived. Nevertheless, the consumer is told that the "unequivocal, verified results speak for themselves."

42. Defendants' marketing is further deceptive and misleading in that it fails to inform consumers (prior to purchase) of the precise composition of ingredients contained in StriVectin-SD (also referred to on the label as "Striadril") Defendants instead hide behind the claim that the product contains a "a proprietary complex of skin firming agents, elasticizers and skin hydrators adding up to the most comprehensive topical formulation shown to effectively confront virtually every aspect of visible stretch mark reduction." Nowhere are consumers advised as to the amounts or percentages of the "key ingredients," (of which the purportedly patented oglio-peptide "Pal-KTTKS" apparently is only one), that have purportedly been demonstrated effective in largely unspecified "breakthrough clinical trials," from which the defendants borrow in making their scientific claims about the product's efficacy.

43. Defendants advertisements also rhetorically ask the consumer whether StriVectin-SD is "Better than Botox?" in a deceptive comparison to that drug. Regarding Botox, defendants' StriVectin-SD advertisements claim:

> Botox has been approved by the FDA for an extremely limited use—the tiny little space of deep furrow between the eyebrows (called glabellar lines)—and can cause side effects such as 'headache, temporary eyelid droop, and nausea.' While StriVectin was not designed to eliminate the deep glabellar lines targeted by Botox, the proprietary StriVectin complex has been shown to significantly reduce the appearance of fine lines and facial wrinkles (including crows' feet) that can add 10-15 years

to your appearance the type of fine lines and wrinkles Botox treatments leave behind.

44. "Dr." Chevreau also asserts StriVectin's proposed superiority to Botox and other procedures as follows, "[t]opical creams and gels offer gradual, continual results, while the effects of injections, facial peels and dermabrasions are rougher on the skin and wear off" Chevreau claims, "StriVectin-SD helps give you a youthful, healthy, glowing complexion faster than retinol, far superior to vitamin C, and without irritation, needles or surgery"

45. StriVectin-SD can be purchased in "high-end" department stores, including stores in New Jersey, or directly from defendants via the defendants' interactive Internet website or by calling a toll-free telephone number included on the defendants' website. Other websites unaffiliated with defendants also offer StriVectin-SD for sale.. Defendants' website charges $135.00 for a 6 oz. tube, although discounts are available with the purchase of multiple tubes.

46. The false, misleading, and unsubstantiated claims that StriVectin-SD has been "clinically proven to dramatically improve the appearance of existing stretch mark's length, depth, texture and discoloration;" that it provides, "Optimum Glycosaminoglycan and Collagen Synthesis;" that 93% of subjects tested experienced "significant measurable results;" and that a "groundbreaking series of studies has demonstrated, without a doubt, the amazing effectiveness of StriVectin-SD[ ]," are repeated on defendants' packaging of StriVectin-SD.

The StriVectin-SID tube and the printing thereon is also deceptive in that it bears the appearance of prescription medication which, in consumers' minds, carries with it the implication that the substance has the government's imprimatur of efficacy and safety—as discussed below, quite the contrary.

48. StriVectin-SD is not tested for safety or efficacy, nor approved by the FDA Similarly the labeling, marketing, advertising, promotion and sale of StriVectin-SD and the claims made by defendants about it are not, in the first instance, scrutinized by the FTC. However, in this instance, the FDA has become involved in regulating defendants' marketing of these products

49. As is reflected in a January 14, 2005 FDA Warning Letter addressed to defendant D. Gay, the FDA has conducted an investigation of defendants Dennis Gay and Basic Research with respect to StriVectin-SD and a related product, StriVectin-SD Eye Cream. The letter reports FDA found serious violations of the federal Food, Drug and Cosmetic Act, 21 U.S.C 321 *et seq.* including that StriVectin-SD's labeling promoted these products with claims that cause them to be "drug[s]" under the aforementioned Act because they are intended to affect the structure or function of the body.

50. The FDA found the following claims about StriVectin-SD to be claims by defendant Basic Research that StriVectin-SD affects the body's structure or function:

- "Intensive Concentrate For Existing Stretch Marks (Striae Distensae)"
- "Clinically Proven to Dramatically Reduce the Appearance of Existing Stretch Mark Length, Depth, Texture & Discoloration"
- "Optimum Glycosaminoglycan and Collagen Synthesis"
- "Better than Botox®?"
- "A stretch-mark reducing emulsion . . . to diminish fine lines wrinkles and crow's feet."
- "[S]uperior wrinkle-reducing properties of a patented oglio-peptide (called PAL-KTTKS) . . . on 'photo-

aged skin' . . . [A] key ingredient in the StriVectin cream."

- "[S]ignificant improvement' in wrinkle depth, Length, wrinkle volume. . ."
- "Pal-KTTKS solution's effectiveness at reducing the appearance of fine lines and wrinkles . . ."
- "StriVectin-SD actually increases the synthesis of new collagen (StriVectin-SD increases collagen synthesis by 117%, increases collagen IV synthesis by 357%, and increases glycosaminoglycan synthesis by 267%), making your skin; thicker and firmer " "StriVectin-SD's clinically proven, proprietary compounds will produce a visible reduction in actual length, size, depth, feel, color, and rough texture of your existing wrinkles and/or stretch marks "
- "[R]educe wrinkles by as much as 68%, . . . and reduce the actual length depth, volume, and surface area of stretch marks/wrinkles,"

  "Q: Can StriVectin-SD® help with acne scars and other types of scarring?

  A: Yes StriVectin-SD users have reported improvement in acne scars, burn scars, chicken pox marks, scars from old injuries, etc"
- "93% of the subjects tested saw a dramatic difference in the depth, length, feel, color and texture of stretch marks"
- "Repair Existing Stretch Marks"
- "[C]linical observations further document the independent active StriVectin-SD isolates dramatically:
  - Decreased the actual length of striae (stretch marks)

- Decreased the depth of indented surfaces
- Increased smooth surfaces
- Increased skin thickness
- Increased skin firmness
- Increased stimulation of collagen synthesis
- Corrected irregularities in skin coloration

"StriVectin-SD: The Most Effective Stretch Mark Repair Compound Ever Developed"

- "[P]roven ability to significantly eradicate the scarred striations of stretch marks. . ."

51. FDA concluded that defendants' products targeted in the Warning Letter, "are not generally recognized as safe and effective for their referenced uses and therefore the products are considered 'new drugs' under section 201 (p) of the Act. New drugs may not be legally marketed in the U.S without prior approval from FDA [section 505(a) of the Act]."

52. The FDA's letter demanded that defendants promptly correct these violations with respect to the marketing of StriVectin-SD and two other products: StriVectin-SD Eye Cream and Dermalin-APg. On January 20, 2005, the FDA re-issued the January 14 letter as an Amended Warning Letter to include defendants' products Mamralin-ARa and TestroGel, (A copy of the FDA's Amended Warning Letter is annexed hereto as Exhibit B)

53. However to date, defendants have failed and refused to rectify their unsubstantiated, false and misleading marketing of StriVectin-SD as ordered by the FDA

Class Action Allegations

54. Plaintiff—who resides in Red Bank, New Jersey—brings this action on her own behalf and additionally, pursuant to New Jersey R. 4:32-1, on behalf of a class consisting of

New Jersey residents who purchased StriVectin-SD since its entry into the market (the "Class") Plaintiff expressly disclaims any intent to seek any recovery in this action for personal injuries that she or any Class member may have suffered.

55. Excluded from the Class are defendants, any parent, subsidiary, or affiliate of any of the defendants; any entity in which any of the defendants has or had a controlling interest, or which any of the defendants otherwise controls or controlled; and any officer, director, employee, legal representative, predecessor, successor, or assign of any of the defendants

56. This action is brought as a class action for the following reasons:

a. The Class consists of hundreds of persons, and is therefore so numerous that joinder of all members, whether otherwise required or permitted, is impracticable.

b. There are questions of law or fact common to the class that predominate over any questions affecting only individual members, including:

i. whether the defendants engaged in a pattern of fraudulent, deceptive and misleading conduct toward the public through its labeling, advertising, marketing, promotion, and sale of StriVectin-SD.

ii. what damages members of the Class have sustained and the proper measure thereof;

iii. whether defendants should be enjoined from the continued mis-labeling, marketing, advertising, promotion, distribution, and sale of StriVectin-SD;

c. The claims asserted by plaintiff are typical of the claims of the members of the Class.

d. Plaintiff will fairly and adequately protect the interests of the Class; and plaintiff has retained attorneys experienced in class and complex litigation, including related litigation involving weight loss supplements.

e. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, for at least the following reasons:

i. Absent a class action, Class members as a practical matter will be unable to obtain redress, defendants' violations of their legal obligations will continue without remedy, additional consumers and purchasers will be harmed, and defendants will continue to retain their ill-gotten gains.

ii It would be a substantial hardship for most individual members of the Class if they were forced to prosecute individual actions,

iii. When the liability of defendants has been adjudicated, the Court will be able to determine the claims of all members of the Class;

iv. A class action will permit an orderly and expeditious administration of the Class claims, foster economies of time, effort, and expense, and ensure uniformity of decisions;

v. The lawsuit presents no difficulties that would unduly impede its management by the Court as a class action

f. Defendants have acted on grounds generally applicable to the Class members, making class-wide monetary and injunctive relief appropriate.

g. The prosecution of separate actions by individual members of the Class would create a risk of incompatible standards of conduct for defendants and of inconsistent or varying adjudications for all parties.

FIRST CAUSE OF ACTION

(Violation of New Jersey Consumer Fraud Act, N.J.S A 56: 8-1 *et seq.*)

57. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 - 56 above as if fully set forth herein.

58. The Consumer Fraud Act prohibits, *inter alia*:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise

N.J.S.A. 56:8-2

59. Defendants, in their capacities as marketer, advertiser, promoter, distributor, and seller of StriVectin-SD, are "persons" as defined in the Consumer Fraud Act. N J.S A § 56:8-1(d).

60. StriVectin-SD constitutes "merchandise" within the meaning of Consumer Fraud Act 56:8-1(c).

61. Defendants' misrepresentations and false, deceptive, and misleading statements with respect to StriVectin-SD, as described above, constitute affirmative misrepresentations and omissions in connection with the manufacture, marketing, advertising, promotion, distribution, and sale of StriVectin-SD, in violation of the Consumer Fraud Act

62 Defendants' false, deceptive, and misleading statements would have been material to any potential consumer's decision to purchase or use StriVectin-SD,. Similarly, the information about StriVectin-SD that defendants concealed from the public would have been material to any potential consumer's decision to buy or use StriVectin-SD.

63. Moreover, defendants made such false, deceptive, and misleading statements, and concealed important information, about StriVectin-SD with the intent that others rely upon such statements, and not become aware of the concealed information

64. Plaintiff and the other members of the Class purchased and used StriVectin-SD for personal use, and suffered ascertainable loss as a direct and proximate result of defendants' actions in violation of the Consumer Fraud Act.

65 As a consequence of defendants' wrongful actions, plaintiff and the other members of the Class suffered an ascertainable loss of moneys, including but not necessarily limited to the purchase price of the StriVectin-SD that they purchased, the amount of such loss to be determined at trial.

66. By reason of the foregoing, defendants are jointly and severally liable to plaintiff and the other members of the Class for trebled compensatory damages—including but not limited to payment of a sum equal to treble the amount of a refund of all moneys acquired by reason of defendants' marketing, advertising, promotion, distribution, or sale of StriVectin-SD—plus reasonable attorneys' fees, filing fees, and reasonable costs of suit. N.J.S.A. 56:8-2.11, 8-2.12, 8-19, the sum or value of all such amounts shall not however exceed $5,000,000

SECOND CAUSE OF ACTION
(Fraud)

67. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 - 66 above as if fully set forth herein

Defendants are misrepresenting the efficacy of StriVectin-SD. For instance, defendants implicitly misrepresent the product as clinically proven, including through quotations from "Drs." Chevreau and Mowrey, who are not medical doctors.

69. Defendants knew that their representations about the efficacy of StriVectin-SD were false and misleading at the time that they made them, and intended that such purchasers and users of StriVectin-SD rely upon such false and misleading representations..

70. Plaintiff and the other members of the Class relied, reasonably, justifiably, and in good faith, on defendants' misrepresentations concerning StriVectin-SD in deciding to purchase and use StriVectin-SD Had they known of the falsity of such misrepresentations, and the true facts about StriVectin-SD that defendants concealed, they would not have purchased or used StriVectin-SD.

71. As a consequence of the foregoing, defendants are jointly and severally liable to plaintiff and the other members of the Class for the damages incurred as a result of defendants' actions, including but not necessarily limited to the purchase price of the StriVectin-SD that they purchased, the amount of such damages to be determined at trial, but in no event to exceed, in sum or value, $5,000,000 total on all causes of action

72. Defendants' conduct was intentional, wanton, willful, malicious, and in blatant disregard of, or grossly negligent and reckless with respect to, the life, health, safety, and well-being of plaintiff and the other members of the Class. Defendants are therefore additionally liable for punitive damages, in an amount to be determined at trial, such amount, however, in no event to exceed $5,000,000 total on all causes of action.

THIRD CAUSE OF ACTION
(Unjust Enrichment)

73. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-72 above as if fully set forth herein.

74. By engaging in the conduct described above, defendants have unjustly enriched themselves at the expense of plaintiff and the other members of the Class and are required, in equity and good conscience, fully to compensate them for the damages that they have suffered as a result of defendants' actions

75. By reason of the foregoing, defendants are jointly and severally liable to plaintiff and the other members of the Class for the damages that they have suffered as a result of defendants' actions, the amount of such damages to be determined at trial, however, the sum or value of such damages, on all causes of action, shall not exceed $5,000,000

FOURTH CAUSE OF ACTION
(Breach of Warranty)

76. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-75 above as if fully set forth herein.

77. Defendants breached express warranties on the label of, and/or advertising for StriVectin-SD about its safety and efficacy, including but not limited to warranties that purchasers can "reduce wrinkles by as much as 68% . . . and reduce the actual length, depth, volume, and surface area of stretch marks/wrinkles."

78. Through their actions, defendant similarly breached implied warranties about the safety and efficacy of StriVectin-SD

79. Defendants made such express and implied warranties knowing the purpose for which StriVectin-SD was to be used, and advocating its use for such purpose.

80. Defendants made such express and implied warranties as part of their marketing campaign; in advertisements in print, on television, on the Internet, and in other media; and on the label of the product.

81. StriVectin-SD does not conform to the express and implied warranties made by defendants and does not conform to defendants' promises, descriptions, or affirmations of fact. StriVectin-SD therefore was not adequately packaged, labeled, sold, promoted, or fit for the ordinary purposes for which it was used.

82. Plaintiff and the other members of the Class purchased StriVectin-SD based upon and in reliance upon such false warranties.

83. As a consequence of the foregoing, defendants are jointly and severally liable to plaintiff and the other members of the Class for the damages incurred as a result of defendants' actions, including but not necessarily limited to the purchase price of the StriVectin-SD that they purchased, the amount of such damages to be determined at trial.

Defendants' conduct was intentional, wanton, willful, malicious, and in blatant disregard of, or grossly negligent and reckless with respect to, the life, health, safety, and well-being of plaintiff and the other members of the Class Defendants are therefore additionally liable for punitive damages, in an amount to be determined at trial, however, in no event shall such amount on all causes of action combined, exceed $5,000,000,

FIFTH CAUSE OF ACTION
(Injunctive Relief)

85. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-84 above as if fully set forth herein.

86 Given defendants' wrongful actions as set forth above, which are ongoing and continuing to deceive and harm purchasers and users of StriVectin-SD and the general public, the Court should (a) preliminarily and permanently enjoin defendants from continuing to market, advertise, promote, distribute, or sell StriVectin-SD through use of any representations

concerning the safety or efficacy of the product and (b) order defendants immediately to take all steps necessary to effectuate a recall of all lots or tubes of StriVectin-SD that they have distributed or sold

WHEREFORE, plaintiff respectfully requests that the Court enter judgment against defendants, jointly and severally, as follows:

1 Certifying this action as a class action, with a plaintiff class as defined above..

2 On plaintiffs First Cause of Action, awarding against defendants, jointly and severally, damages in the amount of three times the loss of moneys that plaintiff and the other members of the Class suffered—including but not limited to payment of a sum equal to treble the amount of a refund of all moneys acquired by reason of defendants' marketing, advertising, promotion, distribution, or sale of StriVectin-SD, plus reasonable attorneys' fees, filing fees, and reasonable costs of suit, plus punitive damages in an amount to be determined at trial, however, the sum total amount of such amounts of trebled damages, attorneys' fees, punitive damages and costs, on all of plaintiffs causes of action combined, shall not, in any event, exceed $5,000,000

3. On plaintiffs Second Cause of Action, awarding against defendants, jointly and severally, the damages that plaintiff and the other members of the Class suffered as a result of defendants' actions plus punitive damages, in an amount to be determined at trial, however in no event shall the total sum of such damages and punitive damages, on all of plaintiffs causes of action combined, exceed $5,000,000.

4. On plaintiffs Third Cause of Action, awarding against defendants, jointly and severally, the damages that plaintiff and the other members of the Class suffered as a result of defendants' actions, the amount of such damages to be determined at trial, however in no event shall the total sum of

such damages and punitive damages, on all of plaintiffs causes of action combined, exceed $5,000,000.

5. On plaintiffs Fourth Cause of Action, awarding against defendants, jointly and severally, the damages that plaintiff and the other members of the Class suffered as a result of defendants' actions plus punitive damages, in an amount to be determined at trial, however in no event shall the total sum of such damages and punitive damages, on all plaintiffs causes of action combined, exceed $5,000,000.

6. On plaintiffs Fifth Cause of Action, (a) preliminarily and permanently enjoining defendants from continuing to market, advertise, promote, distribute, or sell StriVectin-SD through use of any representations concerning the safety or efficacy of the product and (b) ordering defendants immediately to take all steps necessary to effectuate a recall of all lots or tubes of StriVectin-SD that they have distributed or sold.

7. Ordering defendants to disgorge all profits earned in connection with the sale of StriVectin-SD.

8 Awarding plaintiff interest, costs, and attorneys' fees, however, the total sum or value of the recovery for all causes of action for damages, trebled damages, punitive damages, interest, costs, attorneys' fees and injunctive relief shall in no event exceed $5,000,000.

9. Awarding plaintiff such other and further relief as this Court deems just and proper

Demand for Jury Trial

Plaintiff hereby demands a trial by jury on all claims in this action.

Designation of Trial Counsel

Pursuant to Rule 4:25-4, the Court is advised that, subject to his admission *pro hac vice*, Jeffrey I. Carton, Esq. is hereby designated as trial counsel.

Certification of Entire Controversy

Pursuant to Rule 4:5-1, it is hereby certified that there is no other known action or arbitration pending or contemplated which arises from the same facts as this matter; and that there are no other parties that need to be added to this action and that should that change, the Court and other parties shall be notified

Certification of Notice Pursuant to N.J.S.A. 56:8-20

Pursuant to N J S A. 56:8-20, a copy of this Complaint will be furnished to the Office of the Attorney General of the State of New Jersey, CN 080, Trenton, New Jersey 08625, within ten days of the filing of this action..

Dated: January 30, 2006

MEISELMAN, DENLEA,
PACKMAN, CARTON &
EBERZ, P.C.

By: /s/ Barry B. Cepelewicz
David J. Meiselman
Jeffrey I. Carton
Barry B. Cepelewicz
Jill C Owens

1311 Mamaroneck Avenue
White Plains, New York 10605
(914) 517-5000

Attorneys for Plaintiff

EXHIBIT

Department of Health and Human Services

Public Health Service
Food and Drug Administration
Southwest Region
Denver District Office
Bldg. 20-Denver
Federal Center
P O. Box 25087
6th Avenue & Kipling Street
Denver, Colorado 80225-0087
Telephone: 303-236-3000
FAX: 303-236-3100

January 20, 2005

AMENDED WARNING LETTER

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Dennis Gay
Chief Executive Officer
Basic Research, LLC
5742 W.. Harold Getty Drive
Salt Lake City, Utah 84116

Ref # Den 05-06 Amended

Dear Mr. Gay:

We are amending our Warning Letter of January 14, 2005 to include your products Mamralin-ARa, and TestroGel and are re-issuing the letter with a January 20, 2005 date. Your expected date of response for all five products is now extended to fifteen working days after this date.

This letter is in reference to your firm's marketing and distribution of StnVectin-SD, StnVectin-SD Eye Cream, Dermalin-APg, Mamralin-ARa, and TestroGel. The Food and

Drug Administration (FDA) has reviewed the labeling for these products, including your websites at www.kleinbecker. com and www strivectin corn FDA has determined that your products StriVectin-SD, StnVectin-SD Eye Cream, Dermalin-APg, Mamralin-ARa, and TestroGel are promoted with claims that Cause the products to be drugs under section 201 (g)(1)(C) of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U S C. 321(g)(1)(C)).

As defined in section 201 (9)(1)(C) of the Act, the term "drug" means articles (other than food) intended to affect the structure or function of the body. The labeling for your products includes several claims that demonstrate that these products are intended to affect the structure or function the body (structure/function claims) Examples of some of the structure/function claims observed in your products' labeling include:

StriVectin-SD:

- "Intensive Concentrate For Existing Stretch Marks (Striae Distensae)"
- "Clinically Proven to Dramatically Reduce the Appearance of Existing Stretch Mark Length, Depth, Texture, and Discoloration"
- "Optimum Glycosaminoglycan and Collagen Synthesis"
- "Better than Botox®?"
- "A stretch-mark reducing emulsion to diminish fine lines, wrinkles and crow's feet."
- "[S]uperior wrinkle-reducing properties of a patented oligo-peptide (called Pal-KTTKS) on 'photo-aged skin' [A] key ingredient in the StriVectin cream"
- "[S]ignificant improvement" in wrinkle depth, length, wrinkle volume . . ."

- "Pal-KTTKS solution's effectiveness at reducing the appearance of fine lines and wrinkles.
- StriVectin-SD actually increases the synthesis of new collagen (StriVectin-SD increases collagen I synthesis by 117%, increases collagen IV synthesis by 357%, and increases glycosaminoglycan synthesis by 267%), making your skin; thicker and firmer."
- "StriVectiu-SD's clinically proven, proprietary compounds will produce a visible reduction in actual length, size, depth, feel, color, and rough texture of your existing wrinkles and/or stretch marks."
- "[R]educe wrinkles by as much as 68%, . . . and reduce the actual length depth, volume, and surface area of stretch marks/wrinkles."

  "Q: Can StriVectin-SD® help with acne scars and other types of scarring?

  A: Yes StriVectin-SD users have reported improvement in acne scars, bum scars, chicken pox marks, scars from old injuries, etc."
- "93% of the subjects tested saw a dramatic difference in the depth, length, feel, color, and texture of stretch marks"

  "Repair Existing Stretch Marks"

  "[C]linical observations further document the independent active StriVectin-SD isolates dramatically:

  - Decreased the actual length of striae (stretch marks)
  - Decreased the depth of indented surfaces
  - Increased smooth surfaces
  - increased skin thickness

- Increased skin firmness
- Increased stimulation of collagen synthesis
- Corrected irregularities in skin coloration"
- "StriVectin-SD: The Most Effective Stretch Mark Repair Compound Ever Developed"
- "[P]roven ability to significantly eradicate the scarred striations of stretch marks . . ."

StriVectin-SD Eye Cream (www.strivectin com):

- "Same active formula as the original StriVectin-SD®
- "StriVectin-SD (the stretch-mark-reducer-turned-anti-wrinkle-phenomenon
- "[S]ignificant decrease in your existing wrinkles or stretch marks . . .

Dermalin-APg (www.kleinbecker.com):

- "The next-generation trapsepidermal fat emulsifying gel"
- "Penetrating Gel Emulsifies Fat On Contact"
- "Dissolves Deep-Stored Body Fat Wherever Applied "
- "[R]educes the accumulation of 'age-related' body fat around your waist and abdomen"
- "[A]ctually reduce the size of 'saddlebag' thighs.
- "[Pjenetrate the skin and shrink a woman's thigh."
- "[R]eleases fat stores from any problem area. When the fat is released from the back of a woman's thigh, the dimpled appearance disappears because tension on the connective tissue is reduced as stored 'depot' fat is released. However, when the gel is applied to the tummy, waist or hips, a dramatic reduction of stored body fat occurs . . .

- "Just apply . . . to your waist or tummy and watch them shrink in size within a matter of days."
- "Wherever you've got those unsightly lumps and bumps, apply Dermalin-APg and they're gone"
- "[F]orces the fat out of adipose tissue cells
- "[O]ne problem area at a time, until you've literally melted the fat and molded your body into a more pleasing shape"

Mamralin-ARa (www.Kleinbecker.com)

- "[D)esigned to protect a woman's breasts from sag and shrinkage caused by weight loss
- "The Adenosine Receptor Agonists (ARAs) in Mamralin-ARa are designed to protect (and in many cases increase) the figure-enhancing fat stores in your bust"
- "[I]nhibiting lipolysis (the process that causes the breast to release stored fat) and simulating fat uptake and retention"
- "[M]akes it difficult for your body to deplete the fat stores in you breast for energy maintaining (and in many cases increasing) the figure-enhancing fat stores in your bust . . . ."
- "[H]elping you get rid of the excess, unwanted fat stored in your hips, thighs, abs, and buttocks . . . ."
- "[A]pplying Mamralin-ARa twice a day is the best way to avoid diet induced breast sag and shrinkage."

TestroGel (www kleinbecker corn)

- "TestroGel for Sexual Enhancement"
- "[Q]uickly raising androgen levels to give you (and your partner) the sexual confidence, stamina, and intensity it takes to truly satisfy -and be satisfied."

- "Testosterone-Boosting Gel . . ."
- "[R]aise your testosterone levels without a doctor's prescription . . . "
- "Increase Testosterone Without Raising Estradiol Levels"
- "[S]uddenly become bigger, more ripped, more powerful, and more aggressive . . ."
- "[H]ave more muscle mass, more strength, and less body fat . . ."
- "[A] clinically verified alternative to prescription performance enhancers"

Furthermore, your products are not generally recognized as safe and effective for the above referenced uses and therefore, the products are considered "new drugs' under section 201(p) of the Act. New drugs may not be legally marketed in the U.S. without prior approval from FDA [section 505(a) of the Act]

This letter is not intended to be an all inclusive review of all claims, labeling, or products your firm markets. It is your responsibility to ensure that all products marketed by your firm comply with the Act and its implementing regulations. We request that you take prompt action to correct these violations. Failure to promptly correct these violations may result in enforcement action without further notice. The Act provides for the seizure of illegal products, injunctions against the manufacturer and/or distributor of illegal products, and criminal sanctions against persons responsible for causing violations of the Act.

Please notify this office in writing within fifteen (15) working days of the receipt of this letter as to the specific steps you have taken to correct the stated violations, including an explanation of each step being taken to identify violations and make corrections to ensure that similar violations will not

recur If the corrective action cannot be completed within 15 working days, state the reason for the delay and the time frame within which the corrections will be implemented.

Any reply should be sent to the attention of Compliance Officer Shelly L. Maifarth at the above address.

Sincerely,
/s/
B. Belinda Collins
District Director

No. 06-1471

FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DENNIS W. GAY, ET AL.,

Petitioners,

v.

SARAH MORGAN,

Respondent.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID J. MEISELMAN
Counsel of Record
JEFFREY I. CARTON
JILL C. OWENS
MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ P.C.
1311 Mamaroneck Avenue
White Plains, New York 10605
(914) 517-5000

Attorneys for Respondent Sarah Morgan

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the Third Circuit's Opinion affirming the District Court's grant of a motion to remand does not conflict with a decision of this Court or another court of appeals, but, rather merely followed firmly established precedent in determining that Petitioners failed to meet their burden of demonstrating to a legal certainty that the amount in controversy exceeded the $5,000,000 statutory minimum amount in controversy under the Class Action Fairness Act of 2005 ("CAFA")?

2. Whether Petitioners have presented compelling reasons to grant the Petition where the Third Circuit's Opinion affirmed the District Court's factual findings that Petitioners failed to meet their burden of demonstrating to a legal certainty that the minimum amount in controversy for jurisdiction under CAFA was present, and where the Third Circuit concluded, as the District Court had, that no improper manipulation or abuse underlay Petitioner's permissible pleading of an amount in controversy below the jurisdictional minimum?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
INDEX TO APPENDICES	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. INTRODUCTION	2
B. PROCEDURAL HISTORY OF THE CASE	13
REASONS FOR DENYING THE PETITION	6
I. THE DECISION BELOW IS CONSISTENT WITH ESTABLISHED PRINCIPLES OF REMOVAL JURISDICTION AND THIS COURTS PRIOR HOLDINGS	7
II. THE PURPORTED SPLIT OF AUTHORITY ON THE STANDARD FOR DETERMINING WHETHER THE REMOVING PARTY HAS DEMONSTRATED THAT THE STATUTORY MINIMUM AMOUNT IN CONTROVERSY IS PRESENT, DOES NOT EXIST	12
III. THE THIRD CIRCUIT'S FACTUAL FINDINGS WERE CORRECT AND, IN ANY EVENT, DO NOT PRESENT A COMPELLING CASE FOR REVIEW	17
IV. ALTERNATIVE GROUND	20
CONCLUSION	22

INDEX TO APPENDICES

Page

APPENDIX A: Order of the United States District Court for the District of New Jersey Denying Application for an Order to Show Cause With Temporary Restraints Staying Remand to State Court Pending Petition For Certiorari ..... App. 1

APPENDIX B: United States District Court's February 28, 2007 Letter from the Office of the Clerk to the Clerk Of the New Jersey Superior Court, Law Division, Monmouth County Transmitting the Certified Copy of the Order Remanding the Action ..... App. 3

APPENDIX C: Defendants' Counsel's March 20, 2007 Notice of Appearance in Action in New Jersey Superior Court ..... App. 5

APPENDIX D: Title 28 U.S.C. § 1447 ..... App. 7

TABLE OF AUTHORITIES

Page

CASES

Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464 (1947) 8, 22

Abrego Abrego v. Dow Chemical Co., 443 F.3d 676 (9th Cir. 2006) 9

Acuna v. Brown & Root, Inc., 200 F.3d 335 (5th Cir.), *cert. denied*, 530 U.S. 1229 (2000) 8

Bliss v. Lockhart, No. 90-2144, 1990 U.S. App. LEXIS 23152 (8th Cir. Dec. 26, 1990) 20

Blockbuster, Inc. v. Galeno, 472 F.3d 53 (2d Cir. 2006) 9

Bloom v. Barry, 755 F.2d 356 (3d Cir. 1985) 10, 11, 13

Boyer v. Snap-On Tools Corp., 913 F.2d 108 (3d Cir. 1990) 9

Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005) 10, 15, 16

Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994) 2, 9, 13

Coyne v. American Tobacco Co., 183 F.3d 488 (6th Cir. 1999) 8

Duncan v. Stuetzel, 76 F.3d 1480 (9th Cir. 1996) 8

Frank v. Bear Sterns & Co., 128 F.3d 919 (5th Cir. 1997) 8

Gafford v. Gen. Elec. Co., 997 F.2d 150 (6th Cir. 1993) 14, 15

Grant v. Chevron Phillips Chem. Co., L.P., 309 F.3d 864 (5th Cir. 2002) 17

TABLE OF AUTHORITIES – Continued

Page

Hayes v. Equitable Energy Res. Co., 266 F.3d 560 (6th Cir. 2001) 17

Lashley v. Artuz, No. 01 Civ. 11542 (SAS), 2004 U.S. Dist. LEXIS 9707 (S.D.N.Y. May 27, 2004) 20

Lontz v. Tharp, 413 F.3d 435 (4th Cir. 2005)..... 8

Lowdermilk v. United States Bank Nat'l Ass'n, 479 F.3d 994 (9th Cir. 2007).....3, 13, 14

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 9

McCord v. Minnesota Mut. Life Ins. Co., 346 F.3d 830 (8th Cir. 2003)..... 17

McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178 (1936)..... 10

Miedema v. Maytag Corp., 450 F.3d 1322 (11th Cir. 2006).....8, 9, 16

Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971).... 10, 11, 12, 13

Oshana v. Coca-Cola, 472 F.3d 506 (7th Cir. 2006)..... 15

Ostrer v. United States, 584 F.2d 594 (2d Cir. 1978)..... 20

Packard v. Provident Nat'l Bank, 994 F.2d 1039 (3d Cir. 1993).....10, 11

Samuel-Bassett v. Kia Motors of America, Inc., 357 F.3d 392 (3d Cir. 2004)..... 8, 10, 11, 12, 13

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941) 7

Smith v. American General Life and Accident Ins. Co., 337 F.3d 888 (7th Cir. 2003)..... 16

TABLE OF AUTHORITIES – Continued

Page

St. Paul Mercury Co. v. Red Cab Co., 303 U.S. 283 (1938) ..... *passim*

Sygenta Crop Protection Inc. v. Henson, 537 U.S. 28 (2002) 7

Tropp v. Western-Southern Life Ins. Co., 381 F.2d 591 (7th Cir. 2004) 16

United States v. Rivera, 844 F.2d 916 (2d Cir. 1988) 20

United States v. Russo, 550 F. Supp. 1315 (D.N.J. 1982), *aff'd without op.*, 722 F.2d 736 (3d Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984) 21

Wetmore v. Ryan, 169 U.S. 115 (1898) 11

White v. FCI USA, Inc., 319 F.3d 672 (5th Cir. 2003) 17

Williams v. Best Buy Co., Inc., 269 F.3d 1316 (11th Cir. 2001) 16

STATUTES AND RULES

28 U.S.C. § 1254 ..... 16, 21, 22

28 U.S.C. § 1332 5

28 U.S.C. § 1332(d)(2) 3

28 U.S.C. § 1332(d)(4)(A)(i)(I) 3

28 U.S.C. § 1332(d)(4)(B) 3

28 U.S.C. § 1332(d)(5)(B) 3

28 U.S.C. § 1441 5

28 U.S.C. § 1447(c) 1, 2, 6, 21

Fed. R. App. P. 41(b) 5

TABLE OF AUTHORITIES – Continued

Page

Fed. R. App. P. 41(d)(2)(A) 21

Sup. Ct. Rule 10 ..... 4, 18

OTHER AUTHORITIES

A. M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot be Determined From the Face of Plaintiff's Complaint: The Need For Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts,* 62 Mo. L. Rev. 681 (1997) 14

14C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 3739 (3d ed. 1998) 7

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Sarah Morgan, on behalf of herself and all others similarly situated, respectfully requests that the Supreme Court deny the petition of Dennis W. Gay, et al. for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

Contrary to the statement of Petitioners, the opinion of the United States District Court for the District of New Jersey is reported at 2006 U.S. Dist. LEXIS 55211 (D.N.J., August 7, 2006).

JURISDICTION

There is no "case[] in the court[] of appeals to be reviewed by the Supreme Court" by petition for writ of certiorari in this action, as required by 28 U.S.C. § 1254. Petitioners never obtained a stay of the return of the case to state court pursuant to 28 U.S.C. § 1447(c). The case has been pending in state court since February 2007. There simply is nothing federal remaining to be reviewed, and therefore, Petitioners purported invocation of this Court's jurisdiction under 28 U.S.C. § 1254(1) is unavailing.

STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioner's statement of statutory provisions involved with the following exceptions. Title 28 U.S.C. § 1447(c) is reproduced at Resp. App. D at App. 7-App. 8.

STATEMENT OF THE CASE

A. INTRODUCTION

In a futile attempt to characterize this case as one presenting compelling reasons for this Court's review on a writ of certiorari, *see* Sup. Ct. Rule 10, Petitioners attempt to portray the Third Circuit's Opinion as in conflict with a decision of this Court, *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938); and as creating a split in the United States courts of appeals on an important federal issue. However, the Third Circuit followed *Red Cab,* and no such split of authority exists in reality.

The Third Circuit's application of a "legal certainty" test to the question whether the proponent of federal jurisdiction had demonstrated the presence of the minimum amount in controversy to sustain jurisdiction, followed a long line of settled Third Circuit precedent – it simply was not a new pronouncement of the Third Circuit that purportedly created a split of authority. Indeed, as to the precise issue determined below, that where a plaintiff pleads less than the jurisdictional minimum the proponent of federal jurisdiction must demonstrate to a "legal certainty" that the case is truly worth more, the only other court of appeals decisions have reached the same conclusion as the Third Circuit below. *Burns v. Windsor Ins. Co.,*

31 F.3d 1092 (11th Cir. 1994); *Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007).

The purported "split of authority" Petitioners contrive is a complete fabrication. Petitioners stitch together a patchwork of cases (some pre- and some post-CAFA) from other courts of appeals, which are not germane to the instant matter. As discussed in detail below, the cases Petitioners cite that applied a "preponderance of evidence" standard, almost without exception, are cases in which the plaintiffs sought an indeterminate amount in damages and the courts had to weigh the evidence advanced by the removing party to determine if it had met its burden of demonstrating that the minimum amount in controversy was present.

The Third Circuit's long-standing application of the "legal certainty" test is consistent with Supreme Court precedent and with the fundamental legal principal that removal statutes are strictly construed with all doubts about the existence of removal jurisdiction to be resolved in favor of remand.

Petitioners attempt generally to cast this New Jersey class action as one in which they are being denied a federal forum to which they believe CAFA entitles them. However, CAFA did not federalize all class action litigation. Rather, Congress left to state courts jurisdiction over class actions where, for example, the class is comprised of under 100 members, 28 U.S.C. § 1332(d)(5)(B), the matter is a "home state" class action, 1332(d)(4)(A)(i)(I), or "local controversy" 28 U.S.C. § 1332(d)(4)(B), and actions such as this one where the amount in controversy does not exceed $5,000,000 in sum or value. 28 U.S.C. § 1332(d)(2).

Thus, the assertion that the Third Circuit's decision thwarts Congress' intent in passing CAFA is misplaced.

The balance of the Petition essentially complains that the Third Circuit's affirmance of the District Court's factual findings was erroneous. As such, the issues do not raise the kind of compelling questions required for review on a writ of certiorari. *See* Sup. Ct. Rule 10.

B. PROCEDURAL HISTORY OF THE CASE

Plaintiff, Sarah Morgan, filed this action on behalf of a class of similarly situated New Jersey citizens and residents who purchased Petitioner's $135 tube of purported miracle skin cream, StriVectin-SD, that is advertised to consumers as eliminating facial fine lines, wrinkles and blemishes, as well as bodily chicken pox scars and stretch marks. Pet. App. F at 50a-52a. In fact, StriVectin-SD is not scientifically proven to be able to make the bodily structural changes Petitioners claim. The action was filed on January 30, 2006 in New Jersey Superior Court, Monmouth County. Ms. Morgan sued under the New Jersey Consumer Fraud Act and under the New Jersey common law for fraud, unjust enrichment, breach of warranty and injunctive relief based on Petitioners fraudulent and deceptive advertising of the efficacy of StriVectin-SD. Pet. App. F at 52a, 68a-71a.

Ms. Morgan permissibly limited the damages she seeks to recover below the CAFA minimum jurisdictional threshold of $5,000,000. Pet. App. F at 52a-53a, 69a-74a. The complaint alleges "the plaintiff class does not seek and will not accept recovery the sum or value of which exceeds $5,000,000." *Id.* at 53a.

On March 22, 2006, Defendants removed this action, pursuant to the removal statute, 28 U.S.C. § 1441 and 1453, to the United States District Court for the District of New Jersey on the purported grounds of federal diversity jurisdiction under 28 U.S.C. § 1332. Ms. Morgan moved on April 20, 2006 to remand this action to state court because she had explicitly limited the damages sought to less than CAFA's $5,000,000 minimum amount in controversy. She argued that defendants could not meet their burden of demonstrating the propriety of this removal.

On August 7, 2006 this Court entered an order granting the motion to remand the action to New Jersey Superior Court. On August 16, 2006, Defendants obtained a stay from the District Court of the remand order in order to pursue an appeal to the Third Circuit. Though leave to appeal was granted, on December 15, 2006, the Third Circuit affirmed this Court's August 7, 2006 remand order.

Defendants next petitioned for panel rehearing, which petition was denied by the Third Circuit on February 2, 2007. Pet. App. C at 26a-27a. The Third Circuit issued its mandate seven calendar days later as Federal Rule of Appellate Procedure 41(b) requires, without Defendants having taken any intervening action to stay the Third Circuit's issuance thereof.

Three days *after* the issuance of the mandate, Defendants filed an Order to Show Cause with Temporary Restraints asking the District Court for a stay of the remand of the action. After briefing and argument of the Order to Show Cause, on February 27, 2007, the Defendants' application for a stay was denied. Resp. App. A.

The day after the denial of the stay, in accordance with 28 U.S.C. § 1447(c), the Clerk of the District Court transmitted a certified copy of the remand order, a certified copy of the docket sheet, the Order denying application for Order to Show Cause, the Mandate of the Third Circuit, and the Third Circuit's Opinion to the Clerk of the New Jersey Superior Court, Monmouth County. Resp. App. B.

Upon the New Jersey Superior Court's receipt of the District Court's February 28, 2007 letter, this case was immediately reinstated and is pending. Indeed, on March 20, 2007, Defendants formally appeared in the state court action, (Resp. App. C), and The Honorable Joseph P. Quinn, J.S.C. has scheduled a case management conference during June 2007.

Federal jurisdiction was extinguished when this action was remanded to state court several months ago without Petitioners having obtained a stay of the remand in order to pursue this petition for a writ of certiorari. Petitioners purport to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1), but they simply have no basis for doing so.

REASONS FOR DENYING THE PETITION

Petitioners' assertion that the Third Circuit's "legal certainty" test: (1) is in conflict with this Court's decision in *St. Paul Mercury Co. v. Red Cab, Co.,* 303 U.S. 283 (1938); and (2) created a split of authority with other Courts of Appeals, is wrong on both counts.

No split of authority exists as to the legal standard to apply in determining the amount in controversy under

CAFA. The purported circuit split Petitioners identify is a fabrication. The Third Circuit's requirement that Petitioner bear the burden of demonstrating to a "legal certainty" that the claim must be worth more than the jurisdictional threshold is consistent with the prior holdings of this Court and of other courts of appeals, as well as with established principles of removal jurisdiction.

The Third Circuit's holdings do not thwart Congress' intent in passing CAFA, because Congress did not federalize all class actions – it expressly left to the state courts certain kinds of class actions, including those seeking $5 million or less in sum or value. Moreover, the Third Circuit's factual findings that Petitioners failed to meet their burden of demonstrating to a "legal certainty" that this case must be worth more that $5 million were correct; but in any event such questions do not present a compelling claim for this Court's review.

I. THE DECISION BELOW IS CONSISTENT WITH ESTABLISHED PRINCIPLES OF REMOVAL JURISDICTION AND THIS COURT'S PRIOR HOLDINGS

It is axiomatic that removal statutes are strictly construed with all doubts about the existence of removal jurisdiction to be resolved in favor of remand. *See, e.g., Sygenta Crop Protection Inc. v. Henson*, 537 U.S. 28, 32 (2002) ("Statutory procedures for removal are to be strictly construed."); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) ("The policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [the removal statute]."); 14C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 3739 at 446-51 (3d ed. 1998). The

strict construction is necessary because a defendant's use of the removal statute "deprives a state court of a case properly before it and implicates important federalism concerns." *Frank v. Bear Sterns & Co.*, 128 F.3d 919, 922 (5th Cir. 1997); *see also Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005).

Numerous courts have agreed with the principle that doubts are to be resolved in favor of remand. *E.g., Samuel-Bassett v. Kia Motors of America, Inc.*, 357 F.3d 392, 403 (3d Cir. 2004); *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir.), *cert. denied*, 530 U.S. 1229 (2000); *Coyne v. American Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999); *Duncan v. Stuetzel*, 76 F.3d 1480, 1485 (9th Cir. 1996). Nothing in CAFA altered this long standing legal principle. *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328-1330 (11th Cir. 2006).

Petitioners' assertion that the Third Circuit's Opinion conflicts with this Court's decision in *Red Cab* is not correct. In fact, the Third Circuit *followed* this Court's decision in *Red Cab* when it recognized that, "[t]he Supreme Court has long held that plaintiffs may limit their claims to avoid federal subject matter jurisdiction." Pet. App. at 8a. The Third Circuit also quoted the *Red Cab* holding that: "[i]f [the plaintiff] does not desire to try his case in federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, *the defendant cannot remove*." *Red Cab*, 303 U.S. at 294 (emphasis added). Thus, the Third Circuit's holding below is consistent with *Red Cab*.

Moreover, nothing in *Red Cab* suggests that the Third Circuit should have adopted "preponderance of evidence" standard, the standard that Petitioners would prefer, rather than the well-settled "legal certainty" test it applied. Indeed *Red Cab* makes no mention whatsoever of a "preponderance of evidence" standard.

Petitioners' suggestion that in contravention of *Red Cab*, the Third Circuit "inexplicably flipped the burden . . . and placed it on the party seeking to *establish* federal jurisdiction," is misleading.[1] As the Third Circuit explained, prior to the passage of CAFA the burden of establishing jurisdiction had long been apportioned to the party seeking to remove the case to federal court. Pet. App. at 6a. *See, e.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these elements."); *Boyer v. Snap-On Tools Corp.,* 913 F.2d 108, 111 (3d Cir. 1990).

As the Third Circuit and the District Court also recognized, every court of appeals to decide the question has held that CAFA did not shift the burden to the party seeking to keep the case in state court. *See* Pet. App. A at 6a-8a; Pet. App. B at 20a-21a. In addition to the Third Circuit below, the other courts of appeals to hold to date that under CAFA, the burden of proving jurisdiction remains on the proponent of federal jurisdiction include: *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1329-30 (11th Cir. 2006); *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006); *Blockbuster, Inc. v. Galeno,* 472 F.3d

[1] In *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994), the Eleventh Circuit specifically rejected the argument Petitioners advance that as the party seeking jurisdiction, it should receive the benefit of *Red Cab's* legal certainty test. 31 F.3d at 1094-95.

53, 57-58 (2d Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005); *see also Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d at 997 (9th Cir. 2007). Thus, Petitioners' argument that the Third Circuit erred or contradicted *Red Cab* by placing the burden on them to demonstrate that federal jurisdiction exists is, simply put, wrong.

In determining that the "legal certainty" test should apply, the Third Circuit did nothing new. It merely followed a long line of its prior holdings: *Samuel-Bassett v. Kia Motors America, Inc.*, 357 F.3d 392 (3d Cir. 2004); *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1044-46 (3d Cir. 1993); *Bloom v. Barry*, 755 F.2d 356, 358 (3d Cir. 1985); *Nelson v. Keefer*, 451 F.2d 289, 292-93 (3d Cir. 1971).

In *Samuel-Bassett*, a prior pronouncement of the "legal certainty" test to which the Third Circuit adhered below, the Third Circuit had carefully reconciled the Supreme Court's two decisions discussing the nature of a defendant's burden of proof in a removal case, namely, *Red Cab* and *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178 (1936). The Third Circuit explained that in *McNutt*, "although a challenge to the amount in controversy had been raised in the pleadings, no evidence or findings in the trial court addressed that issue." 357 F.3d at 397. *McNutt* therefore appropriately held that where factual disputes over the amount in controversy were involved, application of a "preponderance of the evidence" standard to resolving those disputes would be appropriate. *Samuel-Bassett*, 357 F.3d at 398.

The Third Circuit also explained in *Samuel-Bassett* that in *Red Cab*, the plaintiff seeking remand had attempted to amend the complaint post-removal to allege damages less than the federal jurisdictional amount, but that the *Red Cab* Court held that the determination whether the requisite amount in controversy is present looks to the face of the pleadings to determine if it is apparent to a legal certainty that the plaintiff cannot recover the amount claimed. *Id.* Specifically, the Third Circuit reconciled the *McNutt* and *Red Cab* holdings as follows:

> In many cases, however, disputes over factual matters may be involved. In resolving those issues, the McNutt preponderance of the evidence standard would be appropriate. Once findings of fact have been made the court may determine whether Red Cab's legal certainty test for jurisdiction has been met.

Id. [internal footnotes omitted].

The Third Circuit in *Samuel-Bassett* "recommend[ed] that when the relevant facts are not in dispute or findings have been made, the District Courts adhere to the 'legal certainty' test cited in such cases as *Packard,* 994 F.2d 1039; *Bloom v. Barry,* 755 F.2d 356 (3d Cir. 1985); and *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971)." *Id.*

Thus, the Third Circuit's decision below did not conflict with *Red Cab* or with any other decisions of this Court.[2]

---

[2] *See also Wetmore v. Ryan*, 169 U.S. 115, 128 (1898) (stating that a lawsuit could not properly be dismissed for failing to satisfy the amount in controversy requirement unless the facts appearing on the record

(Continued on following page)

II. THE PURPORTED SPLIT OF AUTHORITY ON THE STANDARD FOR DETERMINING WHETHER THE REMOVING PARTY HAS DEMONSTRATED THAT THE STATUTORY MINIMUM AMOUNT IN CONTROVERSY IS PRESENT, DOES NOT EXIST

Petitioners' attempt to portray the Third Circuit's decision as *creating* a split of authority on the issue of the proper standard to be applied in determining if the jurisdictional minimum is present, is pure sophistry. They claim that all earlier court of appeals decisions have adopted a "preponderance of evidence" standard, Pet. at 13-14, but, in fact, no such split among courts of appeals was created by the Third Circuit's decision.

As discussed above, the Third Circuit's decision merely followed a long line of earlier Third Circuit precedent, including *Nelson v. Keefer, supra*, a case more than 35 years old, requiring adherence to the "legal certainty" standard. In an effort to fabricate a split of authority created by the Third Circuit's decision below, Petitioners completely ignored these decisions, including *Samuel-Bassett*, binding precedent discussed by the Third Circuit in its Opinion below, that applied the "legal certainty" test and rejected the "reasonable probability" test for assessing if the proponent of federal jurisdiction had carried its burden of demonstrating that the minimum amount in controversy is present. *Samuel-Bassett*, 357 F.3d at 396-398.

In this regard, the *Samuel-Bassett* court held that: "despite the use by some courts of such phrases as "more

---

create a legal certainty of the conclusion that the threshold has not been met).

likely than not," "substantial likelihood," and "reasonable probability," we recommend that when the relevant facts are not in dispute or findings have been made, the District Courts adhere to the 'legal certainty' test" adopted in its prior holdings in, for example, *Packard,* 994 F.2d 1039; *Bloom v. Barry,* 755 F.2d 356 (3d Cir. 1985); and *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971). *Id.* at 398.

The Ninth Circuit in *Lowdermilk* recently agreed with the Third Circuit below and also rejected the "preponderance of evidence" test where a plaintiff pleads a specific damages amount less than the jurisdictional threshold. 479 F.3d at 998. The Ninth Circuit found that in that scenario, it is usually unnecessary to look beyond the four corners of the complaint absent evidence of bad faith pleading. *Id.* To avoid remand, a defendant must contradict plaintiff's assessment of damages and overcome the presumption against federal jurisdiction by producing proof to a "legal certainty." 479 F.3d at 998-99.

Thirteen years ago, in *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994), a case on all fours with this one, the Eleventh Circuit rejected the "preponderance of evidence" standard because in all the cases adopting such a standard the amount of damages sought by plaintiff was unspecified, and applied the "legal certainty" test to a defendant's attempt to show that plaintiff's specific limitation of damages to $5,000 below the jurisdictional minimum was illusory and designed to defeat federal subject matter jurisdiction 31 F.3d 1095-97.

In light of the consistent earlier holdings of the Third Circuit, including *Samuel-Bassett*, as well as the Eleventh Circuit's decision in *Burns,* Petitioners' attempt to characterize the Third Circuit's decision as creating a split of

authority can be summarily rejected. The Ninth Circuit's *Lowdermilk* decision merely reinforces this.

As to Petitioners' specific attempt to show a split of authority, on page 14 of the Petition, Petitioners cite to a string of decisions, most pre- and a few post-CAFA, in which other courts of appeals presented with different factual scenarios have found that the defendant seeking removal must prove by a "preponderance of the evidence" that the amount in controversy requirement is met, and argue that the Third Circuit's decision created a conflict with them. It did not.

Even a cursory look at the holdings of the cases Petitioners cite make clear that it is necessary to differentiate between the cases depending on the scenario presented. Courts have distinguished between cases where, (1) as here, plaintiff has pled a binding, specific amount of damages below the jurisdictional threshold and not attempted to amend that amount post-removal; (2) the plaintiff has pled an indeterminate amount or the facts as to the amount of damages sought is disputed; and, (3) the plaintiff has alleged damages in excess of the amount in controversy. The need to make these distinctions because of their impact on the proper standard of review to be applied, has been recognized not only by the most recent court of appeals decision in this area but also by courts and commentators writing more than a decade ago. *See, e.g., Lowdermilk,* 479 F.3d at 998; *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 156-58 (6th Cir. 1993) (providing a review of the tests adopted by the courts in the various scenarios); A. M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot be Determined From the Face of Plaintiff's Complaint: The Need For Judicial and Statutory Reform to Preserve*

Defendant's Equal Access to Federal Courts, 62 Mo. L. Rev. 681 (1997) (defining the various scenarios, citing cases, and advocating in 1997 for the adoption of a uniform "legal certainty" test in order to foster consistency with this Court's precedent).

A few of the cases Petitioners cite expressly recognize the *Red Cab* holding, which the Third Circuit relied upon, that a plaintiff is the master of his or her complaint and may permissibly plead below the jurisdictional minimum to avoid removal, and thus cannot fairly be said to conflict with the Third Circuit's Opinion below. *See Oshana v. Coca-Cola,* 472 F.3d 506, 511 (7th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005); *Gafford v. General Elec. Co.*, 997 F.2d 150, 157-58 (6th Cir. 1993).

In *Oshana*, for example, a pre-CAFA case, the plaintiff pled an amount in controversy below the $75,000 threshold but later refused to admit she would not seek damages in excess of that amount, which worked against her. 472 F.3d at 512. The *Oshana* court, relying on *Red Cab*, recognized that "if *Oshana* really wanted to prevent removal, she should have stipulated to damages not exceeding the $75,000 jurisdictional limit." *Id.* at 511. Because she refused to continue to limit her damages, the court was forced to treat the case as one requesting an indeterminate amount of damages and applied a "preponderance of evidence" standard to the defendant's evidence that the claim had to be worth more than $75,000.

Likewise, in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), the plaintiff's complaint was silent as to the amount in controversy, unlike plaintiff in this case. 427 F.3d at 449. The court required the removing

party to show the stakes of the litigation to a "reasonable probability." *Id.* However, in doing so, the *Brill* court specifically recognized that the plaintiff could have capped recovery by representing that the class would neither seek nor accept more than $5 million to keep the amount in controversy below the threshold. *Id.*

The majority of the cases Petitioners cited are cases where, unlike the present circumstances, the complaints were either silent as to the amount of damages sought, the amount was indeterminate, or disputes over factual matters concerning the amount in controversy were involved. For example, in *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006), the plaintiff did not plead a specific amount of damages at all. 450 F.3d at 1324-25. Only because of that, the Eleventh Circuit affirmed the district court's application of a "preponderance of evidence" standard to the evidence put forward by the proponent of federal jurisdiction that the amount in controversy actually exceeded the CAFA minimum. 450 F.3d at 1330. The *Miedema* court stated: "'[w]here, as here, the plaintiff has not pled a specific amount of damages, the removing defendant must prove by a preponderance of evidence that the amount in controversy exceeds the jurisdictional requirement.'" *Id.*, *quoting*, *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1319 (11th Cir. 2001).

In *Tropp v. Western-Southern Life Ins. Co.*, 381 F.3d 591 (7th Cir. 2004) the Seventh Circuit applied a "reasonable probability" test to the question whether the defendant had offered sufficient evidence to show that the requisite amount in controversy existed, where the plaintiff had not specified an amount in controversy. 381 F.3d at 595. *Accord Smith v. American General Life and Accident Ins. Co.*, 337 F.3d 888 (7th Cir. 2003) (applying a

preponderance of evidence standard to assessment of removing defendant's proof that the $75,000 minimum amount in controversy was present where the elements necessary to determine the amount in controversy were unspecified); *McCord v. Minnesota Mut. Life Ins. Co.*, 346 F.3d 830 (8th Cir. 2003) (applying a preponderance standard where the complaint alleged no specific amount of damage); *White v. FCI USA, Inc.*, 319 F.3d 672, 675 (5th Cir. 2003)) (same); *Grant v. Chevron Phillips Chem. Co., L.P.*, 309 F.3d 864 (5th Cir. 2002) (applying a preponderance standard where plaintiff was prohibited by state law from alleging a specific damages amount in the complaint), *cert. denied*, 538 U.S. 945 (2003); *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560 (6th Cir. 2001) (requiring a showing by a preponderance of evidence where a complaint sought unspecified damages).

It can readily be seen that Petitioners suggestion that the Third Circuit's Opinion below applying a "legal certainty" test created a split of authority with other courts of appeals that have applied a "preponderance of evidence" test to the issue of the proper standard of review of the evidence of the amount in controversy, is inaccurate. As no split of authority exists and as the decision below is consistent with this Court's prior holdings, earlier Third Circuit precedent, and fundamental principles of removal jurisdiction, no compelling reason exists for the acceptance of this Petition for a writ of certiorari.

III. THE THIRD CIRCUIT'S FACTUAL FINDINGS WERE CORRECT AND, IN ANY EVENT, DO NOT PRESENT A COMPELLING CASE FOR REVIEW

The Third Circuit's factual findings that Petitioners failed to meet their burden of demonstrating a sufficient

amount in controversy for federal jurisdiction was correct under settled law, and, in any event, do not present a compelling case for review on a writ of certiorari. *See* Sup. Ct. Rule 10.

The Third Circuit found that Petitioners failed to demonstrate to a legal certainty that Respondent Morgan's damages limitation was made in bad faith because: (1) they did not specify the kind of punitive damages exposure that existed in the circumstances; (2) they failed to provide any information about how much profit from New Jersey sales of StriVectin-SD was available for disgorgement; (3) they failed to provide any statistical information regarding the amount of StriVectin-SD sold in New Jersey; and (4) they failed to provide the evidence of the actual price paid by the class members for the product.[3] Pet. App. A at 10a-12a.

As to Petitioners' claim that the Third Circuit disregarded the true value of the case by neglecting to value disgorgement, attorneys' fees and punitive damages, the courts below explained that Petitioners failed to provide factual support for their assertion that the value of the case must far exceed $5 million, in contrast with Respondent's tangible, straight-forward pleading stating that the

---

[3] Petitioners' suggestion that the Third Circuit improperly permitted Respondent to amend her damages limitation post-removal, is a red herring. There simply was no post-removal amendment, affidavit or stipulation advanced by Respondent or her counsel for the purpose of reducing the amount sought. There was no need for any such thing because Respondent's complaint clearly and validly limited the damages sought to less than $5 million in sum or value. Based on case law and Respondent's damages limitation, the Third Circuit agreed that the disgorgement sought could only apply to profits earned from sales to class members. Pet. App. A at 11a.

financial award sought does not exceed $5 million. These factual findings are ill-suited to the Court's review.

Petitioners' argument that the value of injunctive relief was not included in the assessment of what Respondent Morgan sought in damages must be rejected for two reasons. First, this argument was not advanced in the Third Circuit (or in the District Court for that matter), and as such Petitioners waived any opportunity to raise the issue on this Petition. Second, as with all the other elements of Respondent's damages claim, Petitioners never advanced any evidence of the cost of an injunction, thus the courts below would have been compelled by Petitioners' failure to do so to conclude as they did with respect to other damages elements, that Petitioners had failed to meet their burden of demonstrating that the case actually must be worth more than $5 million.

Petitioners also attempt to mislead the Court by suggesting that the Third Circuit erred in rejecting jurisdiction over this case where it had found that the case "in all likelihood" could meet the minimum amount in controversy. Pet. at 12. The Third Circuit made no such finding. In suggesting that it did, Petitioners deliberately take out of context, the Third Circuit's statement that:

> [i]f this court had all the information available to make [] a determination [whether plaintiff's actual monetary demands in the aggregate exceed the threshold, irrespective of whether the plaintiff states that the demands do or not], our conclusion here might be that the plaintiff's claim in all likelihood exceed $5 million.

Pet. App. A at 10a.

No fair reading of the foregoing passage would conclude that the Third Circuit stated that the case "in all likelihood" must be worth more than $5 million. Rather, what the Third Circuit was saying is simply that Petitioners failed to meet their burden of demonstrating with "legal certainty" that the case is necessarily worth $5 million because they failed to provide the Court with the necessary information with which to decide in their favor. In light of these findings Petitioners' suggestion that the Third Circuit erred in depriving them of the federal forum to which they are entitled under CAFA, ring hollow.

IV. ALTERNATIVE GROUND

This Court has no jurisdiction to hear this appeal where the action has already been remanded and is pending in state court.

As discussed in detail above, the Third Circuit issued the mandate in this action on February 12, 2007, thereby transferring back to the District Court the jurisdiction of the Court of Appeals over this action. *E.g., Bliss v. Lockhart*, No. 90-2144, 1990 U.S. App. LEXIS 23152, *2 (8th Cir. Dec. 26, 1990) ("The effect of the mandate is to transfer jurisdiction from the court of appeals to the district court from which the case originated"); *United States v. Rivera*, 844 F.2d 916, 920-921 (2d Cir. 1988) ("Simply put, jurisdiction follows the mandate); *Ostrer v. United States,* 584 F.2d 594, 598 (2d Cir. 1978) ("The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and remove it from the jurisdiction of this Court, returning it to the forum whence it came."); *Lashley v. Artuz*, No. 01 Civ. 11542 (SAS), 2004 U.S. Dist. LEXIS 9707, *3-4 (S.D.N.Y. May 27, 2004) (jurisdiction follows the

mandate); *United States v. Russo,* 550 F. Supp. 1315, 1318 (D.N.J. 1982), *aff'd without op.,* 722 F.2d 736 (3d Cir. 1983), *cert. denied,* 464 U.S. 1045 (1984) (circuit court retains jurisdiction over case until mandate has issued).

Defendants inexplicably failed to comply with the provisions Federal Rule of Appellate Procedure 41(d)(2)(A) regarding seeking a stay of the mandate pending filing a petition for a writ of certiorari. However, Defendants knew they needed a stay of the execution of the remand order because they sought one from the District Court. On February 15, 2007, Defendants filed an emergency Order to Show Cause with Temporary Restraints with the District Court seeking a stay of the transmittal of the case back to state court, pending their filing of a petition for certiorari. The stay application was flatly denied on February 27, 2007. Resp. App. A at App. 1 – App. 2.

The following day, the Clerk of the District Court transmitted a certified copy of the remand order and other relevant documents to the Clerk of the New Jersey Superior Court, as 28 U.S.C. § 1447(c) requires, (Resp. App. B at App. 3 – App. 4), thereby extinguishing any remnant of federal jurisdiction over the action. As the removal statute expressly provides, once "[a] certified copy of the order of remand [is] mailed by the clerk to the clerk of the state court . . . the State court may thereupon proceed with such case." 28 U.S.C. § 1447(c).

Defendants' Petition, claims jurisdiction in this Court under 28 U.S.C. § 1254. Yet that provision, on its face, allows for review only of "[c]ases *in* the courts of appeals . . . ," not of cases pending in state court. *Id.* (emphasis added). Here, there simply is no longer a "case[] in the court[] of appeals to be reviewed by the Supreme Court"

by petition for writ of certiorari as 28 U.S.C. § 1254 requires. Nor is there even a case in a United States district court from which Defendants can seek this review. The case was transmitted to and is pending in state court. Resp. App. C at App. 5 – App. 6.

Although a few very old cases suggest that in certain circumstances the issuance of the mandate does not defeat this Court's jurisdiction, *e.g.*, *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947), not one of those cases suggest this Court may exercise jurisdiction over an action even after the district court has remanded it and it is pending in state court, such that there is nothing in any federal court from which to appeal.

For this additional reason, summary denial of the Petition for want of jurisdiction is warranted.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID J. MEISELMAN*
JEFFREY I. CARTON
JILL C. OWENS
MEISELMAN, DENLEA, PACKMAN,
CARTON & EBERZ P.C.
1311 Mamaroneck Avenue
White Plains, New York 10605
(914) 517-5000

Counsel of Record

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SARAH MORGAN,	:	
Plaintiff,	:	Civ No 06-1371 (GEB)
v	:	**ORDER**
DENNIS W. GAY, ET AL	:	(Filed Feb. 27, 2007)
Defendants	:	

BROWN, Chief Judge

This matter having come before the Court upon the Application for an Order to Show Cause With Temporary Restraints Staying Remand to State Court Pending Petition for Certiorari of Defendants Dennis W Gay, Gina Gay, Basic Research, L.L.C., Ban, L.L.C., Klein-Becker, USA, L.L.C., Covaxil Labs, L.L.C., Carter-Reed Co, L.L.C., A.G. Waterhouse, L.L.C., Alphagenbo Tech, L.L.C., Body Forum, L.L.C., Body Innoventions, L.L.C., Covarix, L.L.C., Bydex Management, L.L.C., Nutrasport, L.L.C., Sovage Dermalogic Laboratories, L.L.C., Western Holdings, L.L.C., George Evan Bybee, Daniel B. Mowrey, Nathalie Chevreau, Mitchell K. Friedlander and Michael Meade (collectively, "Defendants"); and the Court having fully reviewed all documents filed and submitted; and for the reasons set forth during the February 27, 2007 telephone hearing with the parties;

IT IS THIS 27th day of February, 2007

ORDERED that the Defendants' Application is DENIED.

s/ Garrett E. Brown, Jr.
GARRETT E BROWN, JR., U.S.D.J.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

OFFICE OF THE CLERK

Martin Luther King Jr. Federal Bldg & U.S. Courthouse
50 Walnut Street, P.O. BOX 419
Newark, N.J. 07101

CAMDEN OFFICE
Mitchell H. Cohen U.S. Courthouse
One John F. Gerry Plaza
Fourth & Cooper Streets Room 1050
Camden, N.J. 08101

TRENTON OFFICE
Clarkson S. Fisher U.S. Courthouse
402 East State Street Room 2020
Trenton, N.J. 08608

[LOGO]
William T. Walsh
Clerk

Reply To: ***TRENTON***

February 28th 2007

NJ Superior Court, Law Division
Monmouth County Courthouse
71 Monument Park
P.O. Box 1266
Freehold, NJ 07728-1266

RE: Morgan v. Gay, et al.
06-1371(GEB)

Dear Clerk,

Pursuant to the order of remand entered in the above entitled matter by this Court, please find the following documents enclosed:

- Certified copy of the order remanding the action
- Certified copy of the docket sheet
- Order denying application for Order to Show Cause
- Order granting Motion for Stay
- Mandate of USCA as to Notice of Appeal
- Opinion

Sincerely,

William T. Walsh, Clerk

/s/ David A. Hartnett
BY David A. Hartnett
Deputy Clerk

APPENDIX C

HOWREY LLP

Citigroup Center
153 E. 53rd Street, 54th Floor
New York, New York 10022

Attorneys for Defendants

SARAH MORGAN, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. DENNIS W. GAY, GINA GAY, BASIC RESEARCH, L.L.C., BAN, L.L.C., KLEIN-BECKER, USA, L.L.C., COVAXIL LABORATORIES, L.L.C., CARTER-REED COMPANY, L.L.C., a/k/a THE CARTER REED COMPANY, A.G. WATERHOUSE, L.L.C., ALPHAGENBO TECH, L.L.C., BODY FORUM, L.L.C., BODY INNOVENTIONS, L.L.C., COVARIX, L.L.C., BYDEX MANAGEMENT, L.L.C., NUTRASPORT, L.L.C., SÖVAGE DERMALOGIC LABORATORIES, L.L.C., WESTERN HOLDINGS, L.L.C., GEORGE EVAN BYBEE, DANIEL B. MOWREY, PhD, NATHALIE CHEVREAU, PhD, MITCHELL K. FRIEDLANDER, and MICHAEL MEADE, Defendants.	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY, LAW DIVISION DOCKET NO. MON-L-556-06 **CIVIL ACTION** **NOTICE OF APPEARANCE**

PLEASE TAKE NOTICE that the undersigned shall hereby appear as counsel for Defendants in conjunction with Mr. James G. McCarney, Esq. whose notice of appearance was previously filed with the Court in this action. Ms. Sarchio and Mr. McCarney, jointly request that all papers served or filed in this action be directed to: Mr. James G. McCarney, Esq., Citigroup Center, 153 E. 53rd Street, 54th Floor, New York, New York 10022.

Dated: March 20, 2007
Washington, DC

/s/ Christina Sarchio
Christina Guerola Sarchio
N.J. Bar No. 02373-1995
Howrey, LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 383-6517 (direct)
(202) 383-6610 (fax)
sarchiochristina@howrey.com (e-mail)

Attorney for Defendants
Carter-Reed Company, L.L.C., a/k/a The Carter Reed Company, Basic Research, L.L.C., DG Enterprises, Inc., Alphagenbo Tech, L.L.C., Body Forum, L.L.C., Body Innoventions, L.L.C., Covarix, L.L.C., Covaxil Laboratories, L.L.C., Bydex Management L.L.C., Western Holdings, L.L.C., Dennis W. Gay, and Natalie Chevereau

APPENDIX D

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter

jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

FILED
JUN 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1471

IN THE

Supreme Court of the United States

DENNIS W. GAY, *et al.*,
Petitioners,

v.

SARAH MORGAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

GARY F. BENDINGER
HOWREY LLP
153 East 53rd St., 54th Floor
New York, N.Y. 10022
(212) 896-6500

STEPHEN E. NAGIN
NAGIN, GALLOP & FIGUEREDO, PA
18001 Old Cutler Road
Miami, Florida 33157
(305) 854-5353

Attorneys for Petitioners, Dennis W. Gay, et al.

JERROLD J. GANZFRIED
Counsel of Record
HOWREY LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

KENNETH M. KLIEBARD
DEANNA L. KEYSOR
HOWREY LLP
321 North Clark St., Ste. 3400
Chicago, IL 60610
(312) 595-1239

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 STATEMENT

The Rule 29.6 Statement set forth in the petition remains accurate.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iv
REPLY BRIEF FOR PETITIONERS	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464 (1947)	1, 2
Biggerstaff v. Voice Power Telecommunications, Inc., 221 F. Supp. 2d 652 (D.S.C. 2002)	6
Buchanan v. Lott, 255 F. Supp. 2d 326 (D.N.J. 2003)	5
Chaparro v. State Farm Insurance Co., No. Civ. A. 99-CV-2063, 1999 WL 961035 (E.D. Pa. Oct. 12, 1999)	6
De Aguilar v. Boeing Co., 47 F.3d 1404 (5th Cir. 1995)	7
Lincoln Property Co. v. Roche, 546 U.S. 81 (2005)	3
Manguno v. Prudential Property & Casualty Insurance Co., 276 F.3d 720 (5th Cir. 2002)	4, 5
Martin v. Franklin Capital Corp., 546 U.S. 132 (2005)	3
In re Minnesota Mutual Life Insurance Co. Sales Practices Litigation, 346 F.3d 830 (8th Cir. 2003)	5
Nagel v. Wal-Mart Stores, Inc., 319 F. Supp. 2d 981 (D.N.D. 2004)	5
Oshana v. Coca-Cola Co., 472 F.3d 506 (7th Cir. 2006), *cert. denied*, No. 06-1443, 2007 WL 1306340 (U.S. June 11, 2007)	4, 7
Sanchez v. Monumental Life Insurance Co., 102 F.3d 398 (9th Cir. 1996)	5
St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938)	6, 7, 9
United States v. Villamonte-Marquez, 462 U.S. 579 (1983)	3
Webb v. American International Group, Inc., 277 F. Supp. 2d 1014 (E.D. Ark. 2003)	5
Wetmore v. Rymer, 169 U.S. 115 (1898)	7

TABLE OF AUTHORITIES—Continued

STATUTES	Page
28 U.S.C. § 1253(c)(1)	2
28 U.S.C. § 1254	3
MISCELLANEOUS	
S. Ct. R. 13(1)	3
Fed. R. App. P. 41(b)	3
N.J. Ct. R. 4:42-6	8
17 Charles A. Wright et al., Federal Practice and Procedure § 4036 (2007)	2
Robert E. Bartkus, *Defendant's Removal Burden: CAFA Defendants Must Prove Minimum Amount in Controversy for Removal*, N.J. L.J. (Feb. 19, 2007)	6
Milton I. Shadur, *Traps for the Unwary in Removal and Remand*, 33 The Journal of the Section of Litigation 43 (Spring 2007)	6
Robert L. Stern et al., Supreme Court Practice § 17.10 (8th ed. 2002)	3

IN THE

Supreme Court of the United States

No. 06-1471

DENNIS W. GAY, *et al.*,
Petitioners,

v.

SARAH MORGAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

Lacking any supportable basis for opposing certiorari, respondent's brief in opposition rests primarily on two incorrect propositions: (1) that this Court lacks jurisdiction because the Third Circuit's mandate has issued, and (2) that the courts of appeal are not in conflict on the questions presented in this case. Respondent's jurisdictional argument is directly contrary to this Court's holding in *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 466-67 (1947). Respondent's denial of a split in authority among the circuits is belied by the numerous opinions that impose distinctly different burdens on a defendant removing a case to federal court. *See* Pet. 12-19.

As the petition explains, the "legal certainty" burden announced by the Third Circuit rests on a mistaken view of this

Court's precedent and diverges from other courts of appeals' determination of the same issue. The existing split in authority is firmly developed so as to permit a complete, thorough examination in this case of an important and recurring question of federal jurisdiction. This Court should grant review.

1. There is no merit to respondent's suggestion that this Court lacks jurisdiction over the petition because the Third Circuit has issued its mandate. Opp. 20. Of the lower court cases respondent cites none addresses the jurisdiction of this Court. *Id.* And not one of the cases respondent cites support the proposition that this Court's jurisdiction is extinguished upon the issuance of a circuit court mandate. Contrary to respondent's contention, this Court's decisions have long held that certiorari jurisdiction exists in precisely the circumstances presented here. In *Aetna*, 330 U.S. at 466-67, the Court explained:

> It is suggested that a decision of a Circuit Court of Appeals ordering remand of a case to a state court is not reviewable. And it is also said that we lack power to review the action of the Circuit Court of Appeals, since the mandate of that court has issued and the District Court has remanded the cause to the state court.
>
> An order of a District Court remanding a cause to the state court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here.[1] But no such limitation affects our authority to review an action of the Circuit Court of Appeals, directing a remand to a state court. Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction.

(Citation omitted); *see also* 17 Charles A. Wright et al., Federal Practice and Procedure § 4036 (2007) ("[I]t is clear that

---

[1] As the petition explains (Pet. 7), CAFA permits a party to appeal from a remand to state court. 28 U.S.C. § 1253(c)(1).

issuance of the court of appeals mandate does not defeat the right to petition for certiorari on the ground that the case is no longer in the court of appeals"); Robert L. Stern *et al.*, Supreme Court Practice § 17.10 (8th ed. 2002) ("The issuance of the lower court's mandate, however, does not destroy the power of the Supreme Court to review the lower court's judgment").

In contrast to longstanding precedent, respondent's proposed reading of 28 U.S.C. § 1254 would deprive this Court of jurisdiction in any case in which a circuit court mandate has issued. *Compare* Fed. R. App. P. 41(b) *and* Sup. Ct. R. 13(1). Under respondent's incorrect view, certiorari jurisdiction would be forever extinguished by the simple circuit court *ipse dixit* of issuing the mandate "forthwith."

Respondent's only comment on this Court's clear holding in *Aetna* is that the decision is "very old." Opp. 22. But the more salient and dispositive points are that *Aetna* is controlling and correct.[2] Nor is there any merit to respondent's suggestion (Opp. 21) that petitioners were required to obtain a stay of the mandate to preserve this Court's jurisdiction. *See, e.g., United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983).

2. Respondent is also incorrect in contending that there is no split of authority among the courts of appeals on the

---

[2] This Court has recently granted certiorari in identical procedural circumstances as those presented here. In *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005), for example, the Fourth Circuit mandate issued on August 12, 2004, pursuant to which the district court remanded the case to state court on August 20, 2004. The timely petition for certiorari was filed on November 24, 2004, and this Court granted certiorari on February 28, 2005. *See* http://pacer.ca4.uscourts.gov/cgi-bin/reports. pl?CASENUM=03-2064&puid=0117915583 (Fourth Circuit docket); http://web2.westlaw.com/print/printstream.aspx?sv=split&destination=atp&prid=B005580 (E.D. Va. docket); S. Ct. docket 04-712; *see also Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005).

questions presented in the petition. Opp. 12. The numerous cases cited in the petition (Pet. 12-19), and in the amicus briefs underscore the undeniable reality that the courts of appeals apply different standards and reach different results.

Only by denying an essential premise of the Third Circuit's decision in this case can respondent even suggest the absence of a conflict. Consistent with established New Jersey law that *ad damnum* clauses in complaints are not binding (*see* Pet. 19-22), the Third Circuit recognized that: "[i]t appears universally agreed that the effect of the [New Jersey] Rule is to significantly curtail, if not totally neutralize, the binding effect of the specific demand for damages." Pet. App. 13a. Accordingly, respondent's attempt to place this case under the rubric of binding *ad damnum* limitations contradicts the stated premise of the decision below and eliminates the entire foundation for her contention that there is no circuit split (Opp. 14-16).

Other courts of appeals apply the "preponderance of the evidence" standard to situations such as this, where a non-binding *ad damnum* clause requests damages in an amount below the jurisdictional threshold. These cases are in direct conflict with the "legal certainty" standard placed on defendants by the Third Circuit. In *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 509 (7th Cir. 2006), *cert. denied*, No. 06-1443, 2007 WL 1306340 (U.S. June 11, 2007), for example, the plaintiff, as here, pleaded a non-binding *ad damnum* below the jurisdictional threshold. The Seventh Circuit, recognizing that the *ad damnum* was nonbinding under Illinois law, gave it "no legal effect" (*id.* at 511), and placed the burden on the removing defendant to show the amount in controversy by a preponderance of the evidence.

Likewise, in *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 722 (5th Cir. 2002), the plaintiff's state court complaint purported to limit damages to an amount below the jurisdictional threshold. The Fifth Circuit, recognizing that

Louisiana gave no preclusive effect to such limitations, *id.* at 723, placed a "preponderance of the evidence" burden on the removing defendant to establish that the requisite amount was in controversy. *Id.* The court found that this burden was met, and that the plaintiff failed to demonstrate to a legal certainty that the amount in controversy was less than the jurisdictional amount. Plaintiff's motion to remand was therefore denied. *Id.* at 724-25.

In any event, there is no rational distinction between the standard to be applied where a complaint pleads no specific amount of damages versus a complaint alleging a non-binding *ad damnum*. *See, e.g., In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003) ("Where, as here, the complaint alleges no specific amount of damages *or* an amount under the jurisdictional minimum, the removing party, . . . must prove by a preponderance of the evidence that the amount in controversy exceeds [the jurisdictional threshold]. The complaint will be dismissed if it appears to a legal certainty that the value of the claim is actually less than the required amount.") (emphasis added) (internal citations and quotations omitted).

Respondent's baseless contention that no circuit split exists is also contradicted by the discussion of the issue by various courts and commentators. *See, e.g., Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 402 (9th Cir. 1996) (rejecting "legal certainty" standard, and noting that "some federal courts have in fact applied a variation of the 'legal certainty' test in removed cases where the plaintiff's complaint does not specify a particular amount of damages"); *Nagel v. Wal-Mart Stores, Inc.*, 319 F. Supp. 2d 981, 983 (D.N.D. 2004) (same); *Webb v. Am. Int'l Group, Inc.*, 277 F. Supp. 2d 1014, 1017 (E.D. Ark. 2003) ("the burden of proof required by Defendants when the complaint does not specify an actual amount of damages is unclear, because Circuit Courts are split"); *Buchanan v. Lott*, 255 F. Supp. 2d 326, 331 (D.N.J. 2003)

("courts both within and outside this circuit have split over the appropriate standard which should be employed to measure the amount in controversy"); *Biggerstaff v. Voice Power Telecomms., Inc.*, 221 F. Supp. 2d 652, 658 n.4 (D.S.C. 2002) ("there is a split of authority on the appropriate burden of proof on a motion to remand"); *Chaparro v. St. Farm Ins. Co.*, No. Civ. A 99-CV-2063, 1999 WL 961035, at *2 (E.D. Pa. Oct. 12, 1999) ("Faced with this issue, other courts have adopted a variety of standards for determining whether federal jurisdiction exists"); Milton I. Shadur, *Traps for the Unwary in Removal and Remand*, 33 The Journal of the Section of Litigation 43, 48 (Spring 2007) ("[D]efendants' burden of actually proving the amount in controversy—parenthetically leaving aside CAFA, on which the decisions to this point are split in allocating the burden of proof—is subject to differing standards from circuit to circuit. Those standards range from a preponderance-of-the-evidence test at one end of the spectrum to legal certainty at the other") (citations omitted); Robert E. Bartkus, *Defendant's Removal Burden: CAFA Defendants Must Prove Minimum Amount in Controversy for Removal*, N.J. L.J. (Feb. 19, 2007); *see also* Chamber of Commerce of the United States of America Brief Amicus Curiae at 5-10; Defense Research Institute Brief Amicus Curiae at 4-10.

In short, there is a widely-recognized, firmly entrenched split in authority as to the standard of proof required to show that the amount in controversy exceeds the jurisdictional amount. This Court's review is needed to assure uniformity of decisions, as well as to provide the federal forum that Congress directed in CAFA.

3. There is no merit to respondent's argument that the Third Circuit decision is consistent with *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). Respondent's contention misconstrues this Court's statement that "unless the law gives a different rule, the sum claimed by the

plaintiff controls if the claim is apparently made in good faith." *Id.* at 288. Contrary to respondent's suggestion, this statement is grounded in a context where *ad damnum* clauses are binding, and recovery is barred above the amount demanded in the complaint. *See, e.g., De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995) ("the above statement from *St. Paul Mercury* plainly was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint"); *Oshana*, 472 F.3d at 511 ("Such disclaimers [of damages above the jurisdictional threshold] have long been approved as a way of staying out of federal court, *see St. Paul Mercury*, but only when the disclaimer is binding") (citation omitted). Unlike respondent, other courts of appeals have been more discerning in their reading and application of *St. Paul*. *See* Pet. 14-16.

Respondent fails to address the actual holding in *St. Paul* that was applied incorrectly by the Third Circuit in the opinion below. *St. Paul* held that:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. *It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.*

303 U.S. at 288-89 (emphasis added) (footnote omitted). Although *St. Paul* placed the burden of defeating federal jurisdiction by the "legal certainty" standard on the party *challenging* federal jurisdiction, the Third Circuit inverted the standard and placed it on the party seeking to *establish* federal jurisdiction. *Cf. Wetmore v. Rymer*, 169 U.S. 115, 128 (1898) ("a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the

record, create a legal certainty of that conclusion"). The Third Circuit decision, which is contrary to the teaching of *St. Paul* and *Wetmore,* incorrectly flips the burden to require legal certainty that the jurisdictional amount was met in order to establish federal jurisdiction.

Much of the remainder of respondent's brief in opposition assumes that petitioners contend that CAFA shifted the entire burden of proof to a plaintiff opposing removal (Opp. 9-10). But petitioners make no such argument. The split in legal authority that petitioners seek to have this Court resolve is the *standard* that the removing defendant must satisfy to establish the amount in controversy for federal jurisdiction.

4. At the end of the day, this case is an ideal candidate for this Court's resolution of a recurring issue on which the circuit courts are split. Indeed, the circumstances of this case are particularly compelling. The Third Circuit permitted respondent's *ad damnum* clause in her state court complaint to weigh against federal jurisdiction, Pet. App. 8a-14a, even though New Jersey law treats such purported limitations as completely non-binding and legally ineffectual. N.J. Ct. R. 4:42-6.

Moreover, the decision below permitted respondent to narrow the scope of the requested relief through a statement in her reply brief in support of her motion to remand to state court. As the petition describes (Pet. 9, 23), the removal proceedings focused on respondent's claim for damages based on nationwide profits. Only after the record established the requisite jurisdictional amount, respondent's reply brief on remand limited the claim to damages on New Jersey sales. *Id.* Such post-removal statements foreclosed any opportunity for petitioners to meet respondent's shifting arguments by submitting evidence of New Jersey-only sales. In expressly noting and relying on this post-removal argument, the Third Circuit reached a profoundly incorrect, unfair result. *See* Pet. App. 11a ("The plaintiff's initial complaint is at least ambigu-

ous as to whether disgorgement applies to nationwide profits or New Jersey profits. As the defendants note, the plaintiff did not explicitly limit the disgorgement of profits demand to New Jersey sales rather than nationwide sales until her remand reply brief"). This was squarely against the holding in *St. Paul* that jurisdiction must be assessed as of the time of removal. 303 U.S. at 292.

Had the court held respondent to the nationwide damage claims pending on the date of removal, the record easily met the jurisdictional minimum. Indeed, the Third Circuit acknowledged that if it had the information available to respondent's newly articulated claim for relief, "our conclusion here might be that the plaintiff's claim in all likelihood exceeds $5 million." Pet. App. 10a. But the Third Circuit remanded to state court by employing a process that precluded the presentation of a record on the belatedly defined New Jersey-only damage claim.

Even imposing its heightened burden on petitioners, the Third Circuit noted that petitioners proved that more than $4 million was in controversy. Pet. App. 12a. Had the court applied the correct standard in assessing all relevant factors, including injunctive relief, attorneys' fees and punitive damages, this case would easily meet the jurisdictional minimum under the standards applied in other circuits.

Burdened with an unfairly heightened standard and respondent's shifting damages target, petitioners have been denied the opportunity intended by Congress to litigate such class action cases in a federal forum. Because the Third Circuit's standard also imposes unwarranted impediments to meeting the amount in controversy requirement for removal in non-class action cases, the ramifications of this issue are even broader and strongly favor this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GARY F. BENDINGER
HOWREY LLP
153 East 53rd St., 54th Floor
New York, N.Y. 10022
(212) 896-6500

STEPHEN E. NAGIN
NAGIN, GALLOP &
FIGUEREDO, PA
18001 Old Cutler Road
Miami, Florida 33157
(305) 854-5353

Attorneys for Petitioners,
Dennis W. Gay, et al.

JERROLD J. GANZFRIED
Counsel of Record
HOWREY LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

KENNETH M. KLIEBARD
DEANNA L. KEYSOR
HOWREY LLP
321 North Clark St., Ste. 3400
Chicago, IL 60610
(312) 595-1239

June 2007

FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 06-1471

IN THE

Supreme Court of the United States

DENNIS W. GAY, ET AL.,
Petitioners,

v.

SARAH MORGAN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
(*Counsel of Record*)
JESSICA D. MILLER
RICHARD G. ROSE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

No. 06-1471

IN THE

Supreme Court of the United States

DENNIS W. GAY, ET AL.,
Petitioners,

v.

SARAH MORGAN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("the Chamber") hereby moves this Court, pursuant to Rule 37.2, for leave to file the attached brief amicus curiae in support of petitioners in this case. While the petitioners have consented to the filing of this brief, respondents Sarah Morgan, *et al.*, have not consented. Correspondence reflecting the consent of the petitioners has been lodged with the Clerk.

The Chamber is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber is well positioned to assist the Court in its evaluation of the parties' arguments because the Chamber regularly advances the interests of its members in courts throughout the country on issues of critical concern to the

business community, and has participated as amicus curiae in numerous cases addressing jurisdictional issues, including recently in *Kircher v. Putnam Funds Trust*, 547 U.S. ---, 126 S. Ct. 2145 (2006).

The Chamber's members are frequently defendants in individual cases and class actions in which the existence of federal diversity jurisdiction is at issue. In addition, the Chamber was involved – on behalf of its members – in organizing support for the much needed class action reforms reflected in the Class Action Fairness Act of 2005 ("CAFA"). As a result, the organization has a wealth of experience in interpreting the jurisdictional requirements set forth in CAFA and is uniquely suited to provide the Court with significant guidance in addressing the policy goals and intent of the legislation – an issue not addressed in detail in the parties' briefs that might otherwise escape the Court's attention.

The Chamber and its members have a strong interest in seeking review of the Third Circuit's December 15, 2006 opinion, which substantially raised the burden on defendants removing cases to federal court by requiring defendants to establish federal jurisdiction by a "legal certainty" and allowing district courts to consider non-binding, post-removal statements by plaintiffs regarding the value of their claims when determining whether the amount in controversy requirement has been met. The Third Circuit's opinion, if left undisturbed, will significantly restrict the ability of defendants to remove cases to federal court – in direct contravention of their constitutional and statutory rights. The Third Circuit's opinion will also blunt the effectiveness of the recent Class Action Fairness Act, wherein Congress specifically provided for expanded federal jurisdiction over, and relaxed the impediments to removal of, certain interstate class actions. The Third Circuit's decision will have far-reaching effects on companies that do business in the United States, many of which are members of the Chamber, by

denying them the ability to avail themselves of diversity jurisdiction.

For the foregoing reasons, the Chamber's motion to file an *amicus* brief in support of petitioners should be granted.

Respectfully submitted,

JOHN H. BEISNER
(*Counsel of Record*)
JESSICA D. MILLER
RICHARD G. ROSE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae
The Chamber of Commerce of
The United States of America

June 6, 2007

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

QUESTIONS PRESENTED.....1

SUMMARY OF THE ARGUMENT.....1

ARGUMENT 2

I. THE THIRD CIRCUIT'S DECISION NULLIFIES THE STATUTORY RIGHT TO REMOVE CASES BASED ON DIVERSITY JURISDICTION.....2

A. The "Legal Certainty" Test Employed By The Circuit Court Improperly Restricts Federal Jurisdiction 5

B. The Third Circuit's Ruling Further Undermines Diversity Jurisdiction By Allowing Plaintiffs To Evade Jurisdiction Through Non-Binding Damages Limitations 10

II. THE THIRD CIRCUIT'S RULING UNDERMINES CONGRESS'S INTENT TO EXPAND FEDERAL JURISDICTION UNDER CAFA 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Bank of the United States v. Deveaux,
9 U.S. (5 Cranch) 61 (1809).....3

Barrow S.S. Co. v. Kane,
170 U.S. 100 (1898).....3

Bolling v. Union Nat'l Life Ins. Co.,
900 F. Supp. 400 (M.D. Ala. 1995).....6

Burns v. Windsor Ins. Co.,
31 F.3d 1092 (11th Cir. 1994).....7

Chase v. Shop 'N Save Warehouse Foods,
110 F.3d 424 (7th Cir. 1997).....13

Constant v. Int'l House of Pancakes, Inc., No. 07-AR-0072-S, 2007 U.S. Dist. LEXIS 33354 (N.D. Ala. Apr. 30, 2007).....9, 10

De Aguilar v. Boeing Co.,
47 F.3d 1404 (5th Cir. 1995).....5, 12

Douglas Energy of N.Y., Inc. v. Mobil Oil Corp.,
585 F. Supp. 546 (D. Kan. 1984).....3

Egan v. Premier Scales & Sys.,
237 F. Supp. 2d 774 (W.D. Ky. 2002).....12

Evans v. Walter Indus.,
449 F.3d 1159 (11th Cir. 2006).....14

Gafford v. Gen. Elec. Co.,
997 F.2d 150 (6th Cir. 1993).....6, 7, 8

Garza v. Bettcher Indus., Inc.,
752 F. Supp. 753 (E.D. Mich. 1990).....7

Gilmer v. Walt Disney Co.,
915 F. Supp. 1001 (W.D. Ark. 1996).....12

TABLE OF AUTHORITIES

Page(s)

Hayfield v. Home Depot U.S.A., Inc.,
168 F. Supp. 2d 436 (E.D. Pa. 2001) 6

Hicks v. Herbert,
122 F. Supp. 2d 699 (S.D. W. Va. 2000) 12

Holmes v. Citifinancial Mortgage Co.,
436 F. Supp. 2d 829 (N.D. Miss. 2006) 11

Landmark Corp. v. Apogee Coal Co.,
945 F. Supp. 932 (S.D. W. Va. 1996) 6

Lowery v. Hanna Steel Corp.,
483 F.3d 1184 (11th Cir. 2007) 9

Martin v. Hunter's Lessee,
14 U.S. (1 Wheat.) 304 (1816) 3

N. Haven Bd. of Educ. v. Bell,
456 U.S. 512 (1982) 15

Pease v. Peck,
59 U.S. (18 How.) 595 (1856) 3

Penn v. Wal-Mart Stores, Inc.,
116 F. Supp. 2d 557 (D.N.J. 2000) 6

Rogers v. Frito-Lay, Inc.,
611 F.2d 1074 (5th Cir. 1980) 16

Rogers v. Wal-Mart Stores, Inc.,
230 F.3d 868 (6th Cir. 2000) 13

St. Paul Mercury Indem. Co. v. Red Cab Co.,
303 U.S. 283 (1938) 13

Tapscott v. MS Dealer Serv. Corp.,
77 F.3d 1353 (11th Cir. 1996) 5

Zahn v. Int'l Paper Co.,
414 U.S. 291 (1973) 16

TABLE OF AUTHORITIES

Page(s)

Statutes and Legislative History

28 U.S.C. § 1332 ..... 2, 14, 16

28 U.S.C. § 1441 2

28 U.S.C. § 1446 ..... 11, 16

28 U.S.C. § 1453 16

Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) 2, 14

151 Cong. Rec. H723 (daily ed. Feb. 17, 2005) 15

Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary, 106th Cong. (1999) 4

Class Action Jurisdiction Act of 1998: Hearing on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. (1998) 4

S. Rep. No. 109-14 (2005) 15

Other Authorities

The Federalist No. 80 (Jacob E. Cooke ed. 1961) 3

James William Moor & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1 (1964) 4

John J. Parker, *The Federal Constitution and Recent Attacks Upon It*, 18 A.B.A. J. 4337 (1932) 4

Steven Plitt & Joshua D. Rogers, *Charting A Course For Federal Removal Through The Abstention Doctrine: A Titanic Experience In The Sargasso Sea Of Jurisdictional Manipulation*, 56 DePaul L. Rev. 107 (2006) 7

TABLE OF AUTHORITIES

Page(s)

Heather Scribner, *Protecting Federalism Interests after the Class Action Fairness Act of 2005: A Response to Professor Vairo*, 51 Wayne L. Rev. 1417 (2005) 17

H. Hunter Twiford, III, et al., *CAFA's New "Minimal Diversity" Standard For Interstate Class Actions*, 25 Miss. C. L. Rev. 7 (2005).....8, 15, 17

Quentin F. Urquhart, Jr., *Amount in Controversy and Removal: Current Trends and Strategic Considerations*, 62 Def. Couns. J. 509 (1995) 8, 11

Sarah S. Vance, *A Primer On The Class Action Fairness Act Of 2005*, 80 Tul. L. Rev. 1617 (2006).....15, 16

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the foregoing Motion for Leave to File.

QUESTIONS PRESENTED

This brief addresses the following questions presented in the petition for a writ of certiorari:

1. Does the Third Circuit's opinion improperly limit federal diversity jurisdiction by increasing the standard of proof by which removing defendants must prove the amount in controversy and by allowing district courts to consider non-binding, post-removal damage limitations when determining whether the amount in controversy requirement has been met?

2. Does the Third Circuit's opinion directly and improperly contravene Congress's intent in enacting the Class Action Fairness Act?

SUMMARY OF THE ARGUMENT

Since our nation's founding, diversity jurisdiction has existed to ensure that proceedings involving parties from different states and sufficiently large quantities of money can be fairly adjudicated in a federal court. In furtherance of that goal, Congress recently amended the diversity statute, in the

---

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the Chamber and its members, made a monetary contribution to the preparation and submission of this brief.

form of the Class Action Fairness Act of 2005 ("CAFA"),[2] and greatly expanded defendants' access to a federal forum in certain class action and "mass action" cases.

The Third Circuit's ruling in this case undermines both the long-standing constitutional right of defendants to litigate diverse cases in federal court as well as Congress's more recent conclusion that large, interstate class actions should be litigated in a federal forum. Specifically, the Third Circuit's decision in this matter substantially increases the burden on defendants removing cases to federal court by: (1) holding that such defendants must establish to a "legal certainty" that federal diversity jurisdiction exists over a removed case or face remand; and (2) allowing the district court to rely on a non-binding damages limitation in a plaintiff's complaint and/or plaintiff's non-binding, post-removal statement regarding the worth of his or her claims when considering whether those claims exceeded the jurisdictional threshold for diversity jurisdiction.

Taken together, the Third Circuit's rulings would severely restrict defendants' ability to remove cases to federal court, thereby denying defendants their constitutional and statutory right to a federal forum in interstate cases. The ruling should be reviewed and reversed.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION NULLIFIES THE STATUTORY RIGHT TO REMOVE CASES BASED ON DIVERSITY JURISDICTION.

The Third Circuit's ruling would nullify the diversity jurisdiction and removal statutes enacted by Congress to establish a federal forum for interstate cases. *See generally* 28 U.S.C. §§ 1332, 1441.

---

[2] Pub. L. 109-2, 119 Stat. 4 (2005).

The concept of diversity jurisdiction has its roots in Article III of the Constitution. The Framers were concerned that some state courts might discriminate against out-of-state businesses engaged in interstate commerce. In short, they feared that non-local defendants might be "hometowned" in state courts. *See Douglas Energy of N.Y., Inc. v. Mobil Oil Corp.*, 585 F. Supp. 546, 548 (D. Kan. 1984) (noting that it is a "familiar notion that Congress has created diversity jurisdiction and the right of removal . . . for the purpose of protecting out-of-state litigants from local prejudice"). By allowing cases involving diverse parties to be heard in federal court, the Framers sought to ensure the availability of a fair, uniform, and efficient forum for adjudicating interstate commercial disputes.[3]

The Framers also believed that federal jurisdiction over diverse claims was necessary to ensure cohesiveness among the states and to strengthen national unity. In establishing diversity jurisdiction, the Framers "sought to prevent even

---

[3] *See Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) ("[Even if] tribunals of states will administer justice as impartially as those of the nation, to the parties of every description . . . the Constitution itself . . . entertains apprehensions on this subject . . . [such] that it has established national tribunals for the decision of controversies between . . . citizens of different states."), *overruled in part on other grounds by Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) ("The object of the [diversity jurisdiction] provisions . . . conferring upon the [federal courts] ... jurisdiction [over] controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides."); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856) (same); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 346 (1816). *See also* The Federalist No. 80, at 537-38 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens.").

the perception of bias" by state courts against out-of-state defendants "because they feared that if litigants believed they had suffered discrimination" in another state's court "they would develop prejudices against other states, thereby destroying the federal comity principles upon which our Union is founded." *Class Action Jurisdiction Act of 1998: Hearing on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. at 80 (1998) (statement of John L. McGoldrick). *See also The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 100 (1999) (prepared statement of Prof. E. Donald Elliott, Yale Law School) (noting that "diversity jurisdiction not only was designed to protect against bias, but to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents"); James William Moor & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1, 16 (1964).

In short, since the nation's inception, diversity jurisdiction has served to guarantee that parties of different state citizenship have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce. In fact, constitutional scholars have argued that:

> *[n]o power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]*; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.

John J. Parker, *The Federal Constitution and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932) (emphasis added)

The Third Circuit's decision in this case would torpedo the intent of the Framers in establishing diversity jurisdiction and nullify the efforts of Congress to codify it. Taken together, the Third Circuit's holding that removing defendants must establish the amount in controversy requirement to a "legal certainty" closes the doors of the federal courthouses in the Third Circuit to removing defendants, and its finding that district courts may consider non-binding, post-removal statements by plaintiffs purporting to limit the value of their claims nails those doors shut. The ruling should be reviewed and reversed.

A. The "Legal Certainty" Test Employed By The Circuit Court Improperly Restricts Federal Jurisdiction.

The Third Circuit's ruling that removing defendants must demonstrate that the amount in controversy in plaintiffs' claims satisfies the jurisdictional threshold to a "legal certainty" will severely limit the ability of defendants to remove cases to federal court by holding defendants to a much higher standard than that recognized by the majority of circuit courts and enabling plaintiffs to easily thwart removal efforts by filing evasive complaints.

Courts around the country have long applied a "preponderance of the evidence" standard in cases where jurisdiction is contested, requiring that a removing defendant show that it is more likely than not that the amount in controversy exceeds the jurisdictional minimum. As these courts have recognized, the preponderance of the evidence standard is neither too lenient nor too strict: it ensures that the plaintiff is "to some extent, still the master of his own claim," *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411-12 (5th Cir. 1995), while, at the same time, protecting the defendant's statutory right to a federal forum. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357 (11th Cir. 1996) (noting that the preponderance standard strikes the "proper balance between a plaintiff's right to choose his

forum and a defendant's right to remove"); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 160 (6th Cir. 1993) (employing the preponderance test because "[w]e believe that the mean between the extremes unsettles to the least extent the balance struck between the defendant's right to remove and the federal interest in limiting diversity jurisdiction").[4] *See also Landmark Corp. v. Apogee Coal Co.*, 945 F. Supp. 932, 935 (S.D. W. Va. 1996) (endorsing the preponderance of evidence standard and observing that "the closest Supreme Court dictum on point suggests that a defendant need only prove by a preponderance of the evidence that the requisite amount exists") (citing *McNutt v. GMAC of Ind.*, 298 U.S. 178, 189 (1936)); *Bolling v. Union Nat'l Life Ins. Co.*, 900 F. Supp. 400, 404 (M.D. Ala. 1995) (preponderance of the evidence standard "properly balance[s] the plaintiff's right to pursue her action in the forum of her choosing and the defendant's right to a federal forum in those cases where federal jurisdiction exists").

The preponderance standard has been embraced by courts and commentators alike because that standard appropriately balances a plaintiff's interest in selecting the forum for his or her action and the defendant's right to avoid the potential for bias and prejudice in another state's courts.

---

[4] Prior to the Third Circuit's ruling in this case, district courts within the Third Circuit viewed the preponderance of the evidence standard favorably because it "properly balances the congressional intention to limit removal and diversity jurisdiction with the protection of the defendant's statutory right to remove in appropriate circumstances." *Penn v. Wal-Mart Stores, Inc.*, 116 F. Supp. 2d 557, 562 (D.N.J. 2000) (adopting the preponderance of the evidence standard "after considering alternative standards of proof used by other courts"); *Hayfield v. Home Depot U.S.A., Inc.*, 168 F. Supp. 2d 436, 454 n.12 (E.D. Pa. 2001) ("Though the Third Circuit has not ruled specifically on the appropriate evidentiary standard, many courts in our Circuit and nationally have held that a preponderance of the evidence is sufficient to establish the amount in controversy for the purpose of establishing federal diversity jurisdiction.").

Moreover, the standard allows defendants – who have little knowledge of the facts relating to the true value of plaintiffs' claims – a fair chance at establishing federal jurisdiction. Steven Plitt & Joshua D. Rogers, *Charting A Course For Federal Removal Through The Abstention Doctrine: A Titanic Experience In The Sargasso Sea Of Jurisdictional Manipulation*, 56 DePaul L. Rev. 107, 124 n.138 (2006) (quoting Lawrence W. Moore, *Federal Jurisdiction & Procedure*, 41 Loy. L. Rev. 469, 481 (1995) (finding that the "preponderance of evidence" standard "seems a sensible and durable equilibrium point on which to balance the parties' interests")).

By contrast, the "legal certainty" test embraced by the Third Circuit in this case tips this balance strongly – and unfairly – in favor of plaintiffs. Under the "legal certainty" test, the plaintiff's claim for damages "deserves deference and a presumption of truth." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994). To meet the "legal certainty" standard, a removing "defendant must prove to a legal certainty that plaintiff's claim must exceed" the jurisdictional minimum. *Id.* This test creates a serious hurdle for removing defendants, who, unlike plaintiffs, may have no actual knowledge of the value of the claims. As a result, the legal certainty test inappropriately requires the defendant to "research, state and prove the plaintiff's claim for damages," *Gafford*, 997 F.2d at 159, without any real means to do so. Indeed, "[i]f the burden of proof were on the defendant in a removed case to show the factual predicate for federal jurisdiction to a legal certainty," as the Third Circuit contends it is, "then the defendant would have to prove the plaintiff's damages to a legal certainty in order to withstand a remand to state court. The application of the legal certainty test in that case would place the defendant in the unenviable position of having to prove the plaintiff's case." *Garza v. Bettcher Indus., Inc.*, 752 F. Supp. 753, 756 (E.D. Mich. 1990).

This approach to jurisdiction is undesirable for numerous reasons, not the least of which is that it may lead defendants to forgo their statutory right to a federal forum rather than "being forced to prove the other side's damages case." *Gafford*, 997 F.2d at 160 (citing *Garza*, 752 F. Supp. at 756-57). Moreover, because defendants' knowledge regarding the value of plaintiffs' claims is largely limited to the facts plaintiffs alleged in their complaint and supporting documents, requiring defendants to prove that the jurisdictional amount has been met to a degree of "legal certainty" essentially allows plaintiffs to foreclose federal jurisdiction completely by limiting (or misrepresenting) the facts related to the value of their claims in their pleadings.

Since most plaintiffs seek to structure complaints so as to avoid federal court (*e.g.*, by avoiding any real description of their damages or understating their *ad damnum* intentions), a court's decision to use the "legal certainty" test versus the "preponderance" test will, in most cases, be outcome-determinative. If a court embraces the "preponderance" test, the defendant has a fighting chance of showing that the plaintiff's alleged damages will *likely* exceed the jurisdictional amount. By contrast, under the "legal certainty" test, it is almost impossible for the defendant to prove, at the pleading stage, the true value of the plaintiff's claims. *See* Quentin F. Urquhart, Jr., *Amount in Controversy and Removal: Current Trends and Strategic Considerations*, 62 Def. Couns. J. 509, 514 (1995) ("maintenance of a federal forum will likely turn on the burden imposed on the removing party"); *see also* H. Hunter Twiford, III, et al., *CAFA's New "Minimal Diversity" Standard For Interstate Class Actions*, 25 Miss. C. L. Rev. 7, 8 (2005) ("many jurisdictional contests involve close facts or close legal issues, and the outcome in these instances is often decided against the party who bears the burden of proof").

This concern is neither theoretical nor exaggerated. Recent decisions in the Eleventh Circuit provide powerful

evidence that raising the standard for removal in the manner done by the Third Circuit here essentially forecloses diversity jurisdiction unless the plaintiff concedes that the amount in controversy is satisfied.

In *Lowery v. Hanna Steel Corp.*, 483 F.3d 1184 (11th Cir. 2007), the Eleventh Circuit departed from the long-standing rule in that Circuit that removal notices are judged under the "preponderance of the evidence" standard by establishing a new rule barring removals unless "the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them," a standard akin to legal certainty. *Id.* at 1211.[5] Immediately on the heels of the *Lowery* decision, a district court in that Circuit interpreted the new "clear statement" standard as an effective bar to diversity jurisdiction where the plaintiff has not specifically alleged damages over the jurisdictional amount. *See Constant v. Int'l House of Pancakes, Inc.*, No. 07-AR-0072-S, 2007 U.S. Dist. LEXIS 33354 (N.D. Ala. Apr. 30, 2007)

Constant involved a plaintiff who sought personal injury damages resulting from a slip-and-fall accident at the defendant's restaurant. *Id.* at *2. Despite the fact that plaintiff offered to settle the case for $75,000 in a pre-suit demand letter, submitted by the defendant with its removal notice, the court, applying *Lowery*, remanded the case to state court, concluding it was "left with speculation as the only means by which it could conclude that the amount in controversy exceeds $75,000 in value." *Id.* at *14. The court further concluded that, in light of the *Lowery* decision, defendants simply should not remove cases to district courts

---

[5] Defendants in *Lowery* have since filed a petition for rehearing *en banc* seeking review of the panel's decision. *See Lowery v. Hanna Steel Corp.*, Nos. 06-16324-CC & 06-16325-CC (11th Cir. May 2, 2007). The Chamber has moved to file a brief as *amicus curiae* in support of the petition for rehearing in that case.

in the Eleventh Circuit on the basis of diversity jurisdiction, "except in the few cases which begin with a state court complaint with an *ad damnum* clause praying for more than $75,000." *Id.* at *1.

Absent review of the instant case, defendants in the Third Circuit will be similarly barred from federal court. By requiring defendants to satisfy a "legal certainty" test, the Third Circuit's ruling will effectively preclude removal in every case in which the plaintiff does not specifically allege claims exceeding the jurisdictional amount. Moreover, the Third Circuit's opinion would encourage plaintiffs to limit the information set forth about the value of their claims in their complaints in order to evade federal jurisdiction. Such a result is directly contrary to the purpose of diversity jurisdiction – *i.e.*, to provide a federal forum for defendants where they might experience local bias in state court.

B. The Third Circuit's Ruling Further Undermines Diversity Jurisdiction By Allowing Plaintiffs To Evade Jurisdiction Through Non-Binding Damages Limitations.

The Third Circuit's overly restrictive "legal certainty" standard is exacerbated by its willingness to: (1) accept non-binding limitations on damages set forth in a plaintiff's pleadings as evidence of the value of that plaintiff's claims; and (2) rely on non-binding, post-removal statements by plaintiffs about the amount in controversy in support of a motion for remand. By allowing plaintiffs to present this unreliable and self-serving evidence in support of their attempts to remand cases to state court, while at the same time requiring defendants to prove the amount in controversy to a "legal certainty," the Third Circuit has essentially stated that removals based on diversity jurisdiction are no longer permitted in the Third Circuit absent plaintiff consent.

1. In concluding that the amount in controversy was not satisfied in this case, the Third Circuit impermissibly relied

on the plaintiff's statement in her complaint that she sought an amount of damages less than the jurisdictional amount, even though that statement was not binding. (*See* Op. at 13 ("if permitted by state laws, [plaintiff] may limit her monetary claims to avoid the amount in controversy threshold").) Under this approach, a plaintiff can *purport* to seek $74,999 in a state court complaint and then re-state the true, higher, value of her claims once removal is no longer timely. Since most states have adopted rules, similar to Fed. R. Civ. P. 54(c), that *do not* limit a plaintiff's damage award to the amount specified in the original complaint, such statements are essentially meaningless. Urquhart, *supra*, at 517.

The risk of forum manipulation posed by non-binding damages limitations is all the greater in non-class action cases, where there is a one-year limit on removal. *See* 28 U.S.C. § 1446(b). In those cases, a plaintiff can simply claim minimal damages in his or her complaint in order to avoid removal and then amend his or her complaint a year and one day after it was filed to add a valuable claim for punitive damages. As the court noted in *Holmes v. Citifinancial Mortgage Co.*, 436 F. Supp. 2d 829, 832 (N.D. Miss. 2006), without a binding stipulation that a plaintiff will not accept more than $75,000 in damages, there is nothing to prevent plaintiffs (with cases worth well over $75,000) from routinely avoiding federal court by explicitly claiming to seek less than $75,000 in the complaint and then amending the complaint once it is too late for the defendants to remove to federal court.

It is this type of gamesmanship that has motivated many courts to use common sense and "read between the lines" of the relief sought in a state court complaint instead of simply taking the statement of damages set in the plaintiff's pleading as fact. These courts have recognized that the only way "to guard against forum shopping and encroachments on the defendant's right of removal" is to require that plaintiffs

seeking to avoid federal jurisdiction file "an unequivocal statement and stipulation limiting damages" with their complaint. *Egan v. Premier Scales & Sys.*, 237 F. Supp. 2d 774, 778 (W.D. Ky. 2002). *See also De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir. 1995) (plaintiffs "who want to prevent removal must file a binding stipulation or affidavit with their complaints") (citing *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992)); *Hicks v. Herbert*, 122 F. Supp. 2d 699, 701 (S.D. W. Va. 2000) ("because under West Virginia law Plaintiffs' recovery is theoretically unlimited, only a binding stipulation that they would not seek nor accept more than $75,000 could limit the potential recovery"); *Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001, 1011 (W.D. Ark. 1996) ("It appears that plaintiff has attempted to 'have her cake and eat it too.' She argues in this court that she is only entitled to crumbs, but has carefully preserved her right to insist that she is entitled to the whole cake when she gets back to state court.").

Rather than apply this healthy dose of skepticism to plaintiff's non-binding damages limitation, the Third Circuit here took the plaintiff at face value, allowing remand based on nothing more than a "gentleman's promise." Such an approach will make it all the more difficult – if not impossible – for defendants in the Third Circuit to exercise their removal rights in diversity jurisdiction cases.

2. The Third Circuit's opinion also restricts a defendant's removal rights by affirming remand based on a *post-removal* stipulation by plaintiff purporting to limit her demand for relief. While the Third Circuit admitted that the plaintiff did not seek to limit her damages until *after* the filing of a reply brief in support of remand (*see* Op. at 15 ("the plaintiff did not explicitly limit the disgorgement of profits demand to New Jersey sales rather than nationwide sales until her remand reply brief")), the Third Circuit nonetheless placed weight on plaintiff's eleventh-hour

limitation in concluding that the amount in controversy was not satisfied.

Because reliance on post-removal stipulations raises very serious forum manipulation concerns, it has long been the rule that jurisdiction is judged by the facts available at the time of removal. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938) ("the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal"). The Third Circuit implicitly rejected this long-standing approach by considering post-removal evidence regarding the value of the plaintiff's claims. As other courts have recognized in rejecting the approach taken here, "[i]f plaintiffs were able to defeat jurisdiction by way of a post-removal stipulation, they could unfairly manipulate proceedings merely because their federal case begins to look unfavorable. Moreover, the interests of simplicity and uniformity dictate that post-removal stipulations be treated just like any other post-removal event." *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 872 (6th Cir. 2000). *See also Chase v. Shop 'N Save Warehouse Foods*, 110 F.3d 424, 430 (7th Cir. 1997) ("allowing a plaintiff to follow the 'wait and see' approach to choosing her forum is unfair to defendants"). The Third Circuit ignored these concerns, endorsing an approach that allows plaintiffs to dip their toes in federal court waters and then run back to the shores of state court if they are disappointed with what they find. This is precisely the result *St. Paul* was intended to guard against.

In sum, the Third Circuit's rulings in this case, taken together, effectively cut off all avenues to a federal forum for a removing defendant in contravention of 28 U.S.C. §§ 1332 and 1441 and this Court's prior holdings – and in conflict with the approach taken by courts around the country. For these reasons, it should be reviewed by the Court.

II. THE THIRD CIRCUIT'S RULING UNDERMINES CONGRESS'S INTENT TO EXPAND FEDERAL JURISDICTION UNDER CAFA.

The Third Circuit's decision also merits review because it is at odds with Congress's intent to substantially expand diversity jurisdiction over class actions by enacting the Class Action Fairness Act.

CAFA was enacted in 2005 to extend federal jurisdiction to certain class actions. Specifically, CAFA provides for expanded jurisdiction in class actions where (1) there are 100 or more members in the plaintiff's proposed class; (2) at least some members of the proposed class have a different citizenship from some defendants; and (3) the claims of the proposed class members exceed the sum or value of $5,000,000 in the aggregate. *See* 28 U.S.C. § 1332(d).

Congress's purpose in enacting CAFA cannot be seriously disputed. CAFA's text, specifically its legislative findings and stated purposes, clearly demonstrates that Congress sought to develop a new jurisdictional regime that would "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance." Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 2(a)(4)(A), 2(b)(2), 119 Stat. 4 (2005).

As courts have previously recognized, "CAFA's language favors federal jurisdiction over class actions" and the "language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction." *See Evans v. Walter Indus.*, 449 F.3d 1159, 1163-64 (11th Cir. 2006). Consistent with the overall intent of the legislation, Congress made clear that doubts regarding removal should be resolved in favor of federal jurisdiction. According to the Senate Report, "[t]he Committee believes that the federal courts are the appropriate forum to decide most interstate class actions because these cases usually

involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14, at 27 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 27. Commentators have also recognized that "CAFA represents the largest expansion of federal jurisdiction in recent memory." Sarah S. Vance, *A Primer On The Class Action Fairness Act Of 2005*, 80 Tul. L. Rev. 1617, 1643 (2006). Through CAFA, Congress "expressly reflect[ed] a goal of changing the jurisdictional status quo for class actions" by extending "federal jurisdiction over interstate class actions which, prior to CAFA's enactment, could not be maintained in or removed to federal court under the existing" regime. Twiford, *supra*, at 9.

The clear intent of CAFA's sponsors was to lower the burden for removal – not raise it. In a colloquy that took place on the House floor moments before passage, one of the bill's key sponsors, then-House Judiciary Committee chairman F. James Sensenbrenner stated: "if a Federal court is uncertain about whether a case puts $5 million or more in controversy, the court should favor exercising jurisdiction over the case." 151 Cong. Rec. H723, 730 (daily ed. Feb. 17, 2005). *See also* S. Rep. No. 109-14, at 35, *as reprinted in* 2005 U.S.C.C.A.N. at 34 (the intent of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications."). While it is well-established that statutory construction requires inquiry into Congressional intent as evidenced in legislative history, this colloquy among key House sponsors of the legislation is entitled to particular deference because it reflects the intentions of the bill drafters and because of its proximity to the House vote. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) ("Although the statements of one legislator made during debate may not be controlling . . . Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.") (internal citation omitted);

Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1080 (5th Cir. 1980) ("In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served . . . and the remarks in debate preceding passage.").

In addition to CAFA's legislative history, the text and structure of the statute both clearly demonstrate that the purpose of CAFA was to create a new set of jurisdictional rules for class actions that would provide for federal jurisdiction over large-scale interstate class actions and ensure that defendants facing such large-scale interstate suits could remove them to federal court. *See* Vance, *supra*, at 1630 ("CAFA's broadened diversity jurisdiction over class actions commensurately expands defendants' opportunities to remove class actions."); *id.* at 1639-40 ("CAFA was no doubt intended to liberalize removal for cases within its scope by eliminating some of the statutory limitations on removal").

For example, the statute's text eliminates several long-standing hurdles to removing interstate class actions to federal court – such as the previous requirement that each class member separately meet the $75,000 amount in controversy requirement. *See Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973). Under CAFA, the claims of putative class members are aggregated to determine if the new $5,000,000 amount is satisfied. 28 U.S.C. § 1332(d)(6). CAFA's requirement that there be minimal diversity among any member of the putative class and any defendant – a departure from the previous rule that required complete diversity among only the class representative(s) and all defendants – also eases an important restriction on removing class actions to federal court.

CAFA also established a new removal provision – 28 U.S.C. § 1453 – applicable only to the removal of diversity class actions. Pursuant to section 1453, class actions may be removed without the consent of any co-defendant, may be

removed without regard to the one-year time limit in 28 U.S.C. § 1446(b), and may be removed without regard to whether any defendant is a citizen of the State in which the suit was originally filed.[6] Taken together, these new provisions "substantially expand federal jurisdiction over class actions" and "drastically liberalize[] rules for removal of class actions." Twiford, *supra*, at 7-8; *see also id.* at 60 ("These fundamental changes greatly liberalize and invite, rather than discourage, federal court jurisdiction over class actions within the scope of CAFA.").

Despite this overwhelming evidence that CAFA was intended to liberalize removal requirements for class actions, reduce the hurdles defendants face in removing cases to federal court, and prevent manipulative pleadings intended to evade jurisdiction, the Third Circuit's decision would make it more difficult for defendants to remove such cases to federal court. In this way, the Third Circuit's ruling turns CAFA on its head – substantially raising the standard for removing cases to federal court instead of relaxing it. Thus, the Third Circuit's ruling "defeat[s] Congress's clear intent in crafting this special-purpose statute," Twiford, *supra,* at 10, and should be reviewed for this reason as well.

---

[6] This provision is not out of step with CAFA's intended goal of protecting out-of-state defendants from local bias. As one commentator has observed, there is "a second purpose for diversity jurisdiction: the Framers feared that state court judges, who lacked life tenure, would be more likely to be influenced by populist sentiments and be biased against merchants." Heather Scribner, *Protecting Federalism Interests after the Class Action Fairness Act of 2005: A Response to Professor Vairo*, 51 Wayne L. Rev. 1417, 1436 (2005) (quotations omitted)

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
(*Counsel of Record*)
JESSICA D. MILLER
RICHARD G. ROSE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

June 6, 2007

FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1471

In The
Supreme Court of the United States

DENNIS W. GAY, ET AL.,

Petitioners,

v.

SARAH MORGAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION OF DEFENSE RESEARCH INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

JOHN J. BURSCH*
MATTHEW T. NELSON
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000

Counsel for Amicus Curiae Defense Research Institute

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Defense Research Institute ("DRI") moves for leave to file the accompanying brief in support of the position taken by Petitioners Dennis W. Gay, et al., under Supreme Court Rule 37.2. Counsel for Respondent Sarah Morgan has withheld consent to the filing of this brief.

DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

DRI participates as an *amicus curiae* in cases that raise issues of vital concern to its membership. This is such a case. DRI believes that resolution of the important jurisdictional issue this petition presents is necessary because the courts of appeals have fractured when determining the burden of proof that a defendant must meet to establish the amount in controversy for removal based on the federal courts' diversity jurisdiction. The issue presented affects not only class actions removed under the Class Action Fairness Act of 2005 ("CAFA"), but every single case removed on the basis of diversity jurisdiction. The confusion fostered by the divergent and conflicting views of the courts of appeals creates the very impediments to review of cases with national implications by

federal courts that Congress sought to eliminate in CAFA. Because removal is an issue of particular significance to defendants, DRI's members are frequently confronted with the focal issue raised by this petition, and their clients are affected by the lack of a clear rule.

While DRI urges the Court to endorse a preponderance-of-the-evidence standard when evaluating the amount-in-controversy requirement, what is of paramount importance is that the Court recognize the potential unfairness of divergent standards being followed in the various circuits. The Court's adoption of a rule that governs all future federal courts in their review of removal petitions will prevent forum shopping and bring consistency and predictability to removal actions.

DRI's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

JOHN J. BURSCH*
MATTHEW T. NELSON
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000

Counsel for Amicus Curiae
Defense Research Institute

**Counsel of Record*

June 2007

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Petition Should Be Granted To Resolve The Three-Way Split Of Authority On The Standard For Removal To Federal Court	4
II. The Panel's Decision Misapplies This Court's Decision In *St. Paul Mercury*	10
III. The Court Should Grant The Petition To Prevent Plaintiffs From Unfairly Depriving Defendants Of Access To Federal Fora	15
CONCLUSION	20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Abrego Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006) 6

BEM I, L.L.C. v. Anthropologie, Inc., 301 F.3d 348 (7th Cir. 2002) 14

Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000) 7

De Aguilar v. Boeing Co., 47 F.3d 1404 (5th Cir. 1995) 7, 13, 14

Duncan v. Gegan, 101 U.S. 810 (1880) 18

Gafford v. Gen. Elec. Co., 997 F.2d 150 (6th Cir. 1993) 8

Gilman v. BHC Sec., Inc., 104 F.3d 1418 (2d Cir. 1997) 9

Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70, 415 U.S. 423 (1974) 18

Harley v. Fireman's Fund Ins. Co., 245 F. 471 (W.D. Wash. 1913) 13

Iowa Central Ry. v. Bacon, 236 U.S. 305 (1915) 10, 13

Laughlin v. Kmart Corp., 50 F.3d 871 (10th Cir. 1995) 10

Lowdermilk v. United States Bank N.A., 479 F.3d 994 (9th Cir. 2007) 7, 12, 15

Maine v. Gilman, 11 F. 214 (C.C.D. Me. 1882) 13

TABLE OF AUTHORITIES – Continued

Page

Martin v. Franklin Capital Corp., 251 F.3d 1284 (10th Cir. 2001) 10

McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178 (1936) 9

Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536 (7th Cir. 2006) 9

In re Minn. Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830 (8th Cir. 2003) 9

Morgan v. Gay, 471 F.3d 469 (3d Cir. 2006) .....*passim*

Munsey v. Testworth Labs., 227 F.2d 902 (6th Cir. 1955) 18

Oshana v. Coca-Cola Co., 472 F.3d 506 (7th Cir. 2006) 9

Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6th Cir. 2000) 8

Samuel-Bassett v. KIA Motors America, Inc., 357 F.3d 392 (3d Cir. 2004) 5, 6

Sanchez v. Monumental Life Insurance Co., 102 F.3d 398 (9th Cir. 1996) 6

Savell v. Southern Ry., 93 F.2d 377 (5th Cir. 1937) 18

In re Second Chance Body Armor, Inc., No. 04-12515 (Bankr. W.D. Mich.) 16

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938) .....*passim*

Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996) 7

Woods v. Massachusetts Protective Association, 34 F.2d 501 (E.D. Ky. 1929) 13

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

City of Bridgeton v. Toyobo Co., No. CUM-L-000036-04 (Cumberland Cty. Super. Ct., N.J.) 16

Johnson v. Second Chance Body Armor, Inc., No. 2004-003268 (La. 14th Cir. Ct.) 16

LaBrosse v. Toyobo Co., No. 04-402021-CZ (Wayne Cty. Cir. Ct., Mich.) 16

Lemmings v. Second Chance Body Armor, Inc., No. CJ-2004-62 (Mayes Cty. Dist. Ct., Okla.) 16

Scannell v. Toyobo Co., No. CV 04-9288 GPS (Cal. Super. Ct.) 16

STATUTES

28 U.S.C. § 1332(a) 4, 5, 10, 18, 19

28 U.S.C. § 1332(d) 2, 4, 5, 18

28 U.S.C. § 1441(b) 19

28 U.S.C. § 1453 2

735 Ill. Comp. Stat. 5/2-604 (2007) 13

Ala. R. Civ. P. 54(c) 13

Alaska R. Civ. P. 54(c) 13

Ariz. R. Civ. P. 54(d) 13

Ark. R. Civ. P. 54(c) 13

Cal. R. Civ. P. § 580(a) 13

Colo. R. Civ. P. 54(c) 13

D.C. R. Civ. P. 54(c) 13

Ga. Code Ann. § 9-11-54(c) 13

TABLE OF AUTHORITIES – Continued

Page

Haw. R. Civ. P. 54(c) 13
Idaho R. Civ. P. 54(c) 14
Ind. Tr. R. 54(c) 14
Kan. R. Civ. P. § 60-254(c) 14
Ky. R. Civ. P. CR 54.03(2) 14
La. R. Civ. P. Art. 862 14
Mass. R. Civ. P. 54(c) 14
Me. R. Civ. P. 54(c) 14
Mich. Ct. R. 2.601(A) 14
Minn. R. Civ. P. 54.03 14
Miss. R. Civ. P. 54(c) 14
Mont. R. Civ. P. 54(c) 14
N.D. R. Civ. P. 54(c) 14
N.J. Ct. R. 4:42-6 14
N.M. R. Civ. P. 1-054(C) 14
N.Y. R. Civ. P. § 3017(a) 14
Nev. R. Civ. P. 54(c) 14
Ohio R. Civ. P. 54(c) 14
Okla. R. Civ. P. § 2004(B)(2) 14
R.I. R. Civ. P. 54(c) 14
S. Ct. R. 37.6 1
S.C. R. Civ. P. 54(c) 14
Tenn. R. Civ. P. 54.03 14
Utah R. Civ. P. 54(c)(1) 14

TABLE OF AUTHORITIES – Continued

Page

Vt. R. Civ. P. 54(c) 14

W. Va. R. Civ. P. 54(c) 14

Wash. R. Civ. P. 54(c) 14

Wis. Stat. (Rule) § 806.01(c) 14

Wyo. R. Civ. P. 54(c) 14

OTHER

Senate Report 109-14 16

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

The facts relevant to the legal issue presented are as follows:

1. Plaintiff Sarah Morgan filed this putative class action in New Jersey Superior Court in early 2006. Pet. App. at 50a. She asserted various claims under New Jersey law against defendants, the manufacturers of the skin cream StriVectin-SD. *Id.* at 68a-73a.

2. Plaintiff's ad damnum sought treble compensatory damages, disgorgement of profits, attorneys' fees, punitive damages, and injunctive relief. Pet. App. at 73a-74a. Plaintiff plead in her ad damnum that "the sum total of [plaintiffs'] . . . trebled damages, attorneys' fees, punitive damages and costs, on all of plaintiffs [sic] causes of action combined, shall not, in any event, exceed $5,000,000." *Id.* at 73a.

3. Petitioners removed the action under CAFA to the United States District Court for the District of New Jersey.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Pet. App. at 3a-4a. Plaintiff in turn moved for remand, asserting that the $5 million amount in controversy required under 28 U.S.C. § 1332(d) had not been satisfied. The district court granted the motion to remand. *Id.* at 25a.

4. The United States Court of Appeals for the Third Circuit granted petitioners leave to appeal the district court's remand order under 28 U.S.C. § 1453. A panel of the Third Circuit held that defendants bear the burden of proving the amount-in-controversy requirement for removal under CAFA, and that because petitioners did not prove to a legal certainty that Plaintiff sought damages exceeding $5 million, the district court's remand order was appropriate. *Morgan v. Gay*, 471 F.3d 469, 477 (3d Cir. 2006). Rather than join the Fifth, Sixth, Seventh, and Eighth Circuits, which had previously held that a removing defendant must prove the jurisdictional amount in controversy by a preponderance of the evidence, the Third Circuit widened an existing circuit split by imposing the burden on removing defendants to prove the amount in controversy "to a legal certainty." *Id.* at 474. Even though the panel acknowledged that the Plaintiff's position that her proposed class "is at least 10,000" and that her trebled compensatory damages alone exceeded $4 million exclusive of punitive damages, profit disgorgement, and statutory attorneys' fees, it concluded that defendants had not shown that Plaintiff's recovery would exceed $5 million to a legal certainty. *Id.* at 476.

SUMMARY OF ARGUMENT

The Court should grant the petition to resolve a deep and mature circuit split regarding the burden that removing defendants must meet to prove the amount in controversy. The range of standards the lower courts have created promotes the very barriers to federal jurisdiction for class actions involving national issues that Congress intended to eliminate in CAFA. The inconsistent decisions of the lower courts also amply demonstrate the need for this Court's urgent intervention.

This case presents an ideal opportunity for the Court to restore consistency to federal diversity jurisdiction and removal jurisprudence by establishing a single standard for the burden of proof a defendant must satisfy to prove the amount in controversy. Importantly, the Court can address the requirement in the context of CAFA, Congress' first statutory change to diversity jurisdiction since changing the amount-in-controversy requirement in 1996. Unless the Court settles the conflict, similarly situated defendants will be treated differently based solely on the federal circuit in which they are sued.

The panel's interpretation also raises the troubling problem that a plaintiff can deprive federal courts of jurisdiction simply by including an ad-damnum clause for a specific amount less than the jurisdictional amount-in-controversy requirement, even though such clauses are not binding on plaintiffs in most states. In other words, if the panel's rule is allowed to stand, plaintiffs would be able to prevent removal based on diversity jurisdiction merely by pleading an amount in controversy that in no way limits the amount they can actually recover. The petition for certiorari should be granted.

ARGUMENT

A defendant seeking to remove based on diversity bears the burden of demonstrating that the jurisdictional amount in controversy is met. 28 U.S.C. § 1332(a). In 2005, Congress enacted CAFA and amended § 1332 (as well as other sections of Title 28) to lessen the requirements for removal of class actions to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pet. App. at 31a-32a. Congress included a $5 million jurisdictional amount-in-controversy requirement for removal under CAFA. 28 U.S.C. § 1332(d)(2). Before CAFA was enacted, the federal courts had already diverged regarding the standard a removing defendant must satisfy to show the amount in controversy for removal; since CAFA's enactment, the circuit split has deepened, with the panel below staking out the most extreme position – that a defendant must prove the amount-in-controversy requirement to a legal certainty. The petition should be granted to resolve the conflict among the federal courts as to the appropriate standards for traditional and CAFA removal under 28 U.S.C. § 1332(a) and (d), respectively.

I. The Petition Should Be Granted To Resolve The Three-Way Split Of Authority On The Standard For Removal To Federal Court.

The petition should be granted to resolve the three-way split of authority among the federal circuit courts of appeal on the standard for removal to federal court. The Third Circuit formulated a standard that requires a defendant to prove the amount in controversy to a legal certainty in all circumstances. The Fifth, Sixth, Seventh,

and Eighth Circuits have concluded that a preponderance-of-the-evidence standard is appropriate. The Ninth Circuit has adopted an intermediate position: the court applies a preponderance-of-the-evidence standard unless the plaintiff specifically pleads an ad damnum less than the jurisdictional requirement, in which case the legal-certainty test applies. All of these courts begin their analysis with the Court's decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938).

In *St. Paul Mercury*, the Court addressed the standard that federal courts were to apply when a plaintiff files suit in federal court based on diversity jurisdiction, and the defendant moves to dismiss, asserting that the plaintiff does not satisfy the amount-in-controversy requirement. 303 U.S. at 288. The Court held that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith," and explained that "[i]t must appear to a *legal certainty* that the claim is really for less than the jurisdictional amount to justify dismissal." *Id.* at 288-89 (emphasis added).

The Third Circuit inappropriately imposed the *St. Paul Mercury* legal-certainty standard on defendants – the parties promoting federal jurisdiction – in all situations. *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006). And although the decision below addresses removal under CAFA, as codified in 28 U.S.C. § 1332(d), the Third Circuit had already adopted the "legal certainty" burden for removing defendants under 28 U.S.C. § 1332(a) in *Samuel-Bassett v. KIA Motors America, Inc.*, 357 F.3d 392, 398 (3d Cir. 2004). In *Samuel-Bassett*, the Third Circuit raised the issue of subject-matter jurisdiction *sua sponte*. The defendant KIA Motors of America had removed the putative product-defect action to the district court based on diversity. The

Third Circuit recognized that the lower district courts had articulated a number of different standards regarding a defendant's burden to prove the amount-in-controversy requirement, including "reasonable probability," "preponderance of the evidence," and "legal certainty." *Id.* at 396. The Third Circuit concluded that dicta in *St. Paul Mercury*, 303 U.S. 283, 289, required the adoption of the legal-certainty standard, *Samuel-Bassett*, 357 F.3d at 397-98, even though the Third Circuit acknowledged that "requiring a defendant to show a legal certainty that the amount in controversy exceeds the statutory minimum may lead to somewhat bizarre situations." *Id.* The Third Circuit's decisions in *Samuel-Bassett* and *Morgan* stake out the most extreme position taken by any circuit court addressing the burden that a removing defendant bears with regard to the amount-in-controversy requirement.

The Ninth Circuit has also adopted the legal-certainty test, albeit only where a plaintiff pleads less than the jurisdictional amount in controversy in the plaintiff's ad damnum. In *Sanchez v. Monumental Life Insurance Co.*, 102 F.3d 398 (9th Cir. 1996), the Ninth Circuit addressed the burden of proof on a removing defendant to prove the amount in controversy, concluding that when the complaint is silent with regard to the amount in controversy, the defendant must prove the amount in controversy by a preponderance of the evidence. 102 F.3d at 404 (citing *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992) (per curiam)); *see also Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683 n.8 (9th Cir. 2006) (explaining that the preponderance standard applies only when a plaintiff fails to plead the amount in controversy and reserving the issue of what standard to apply when a plaintiff pleads an amount less than the jurisdictional amount) (per curiam).

Earlier this year, the Ninth Circuit confronted the situation where the plaintiff's ad damnum pleads damages that are less than the jurisdictional amount. *Lowdermilk v. United States Bank N.A.*, 479 F.3d 994, 998-1000 (9th Cir. 2007). Citing the Third Circuit's decision in *Morgan*, the court concluded that a legal-certainty standard applied in such a situation. *Id.* at 999; *cf. Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996) (explaining "[w]here a plaintiff has made an unspecified demand for damages," it is inappropriate to impose "the daunting burden of proving, to a legal certainty, that the plaintiff's damages are not less than the amount-in-controversy requirement"), *overruled on other grounds*, *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072-73 (11th Cir. 2000).

The other circuits that have addressed the issue have all concluded that the preponderance-of-the-evidence standard is appropriate in all circumstances. For example, the Fifth Circuit explicitly rejected the legal-certainty standard where a plaintiff pleads an ad damnum of less than the jurisdictional amount. *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410-11 (5th Cir. 1995). In *De Aguilar*, the plaintiffs, "in a bold effort to avoid federal court," had specifically alleged that their respective damages did not exceed the jurisdictional amount. *Id.* at 1409-10. The Fifth Circuit recognized that "[t]he majority of states, however, have followed the example of Federal Rule of Civil Procedure 54(c) and do not limit damages awards to the amount specified in the ad damnum clause of the state pleading." *Id.* at 1410. The court concluded that the changes in the state rules undermined any imposition of the legal certainty standard on a removing defendant:

> These new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of their pleading.

Id. The Fifth Circuit ultimately held "that if a defendant can show that the amount in controversy actually exceeds the jurisdictional amount, the plaintiff must be able to show that, as a matter of law, it is certain that he will not be able to recover more than [the jurisdictional amount]." *Id.* at 1411.

Similarly, the Sixth Circuit places a preponderance-of-the-evidence burden on the removing defendant. *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993). Like the Fifth Circuit, the Sixth Circuit recognized that "state counterparts to Rule 54(c) of the Federal Rules of Civil Procedure, might enable a plaintiff to claim in his or her complaint an amount lower than the federal amount-in-controversy requirement in an attempt to defeat jurisdiction while actually seeking and perhaps obtaining damages far in excess of the federal requirement." *Id.* at 157. The Sixth Circuit adopted the "preponderance of the evidence" test because it "best balances the competing interests of protecting a defendant's right to remove and limiting diversity jurisdiction." *Id.* When confronted with a situation where the plaintiff alleged an amount in controversy below the jurisdictional amount, the Sixth Circuit applied the same preponderance-of-the-evidence standard it adopted in *Gafford*. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871 (6th Cir. 2000).

The Seventh Circuit has also adopted the preponderance-of-the-evidence standard, explaining that because the removing defendant "is the proponent of jurisdiction, it has the burden of showing by a preponderance of the evidence facts that suggest the amount-in-controversy requirement is met." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006) (citing *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543 (7th Cir. 2006)). Like the Fifth Circuit, the Seventh Circuit applies the legal-certainty test only to a plaintiff opposing removal: "Once the defendant in a removal case has established the requisite amount in controversy, the plaintiff can defeat jurisdiction only if 'it appears to a legal certainty that the claim is really for less than the jurisdictional amount.'" *Id.* (quoting *St. Paul Mercury*, 303 U.S. at 289).

In similarly endorsing the preponderance-of-the-evidence standard, the Eighth Circuit held that where a plaintiff "alleges no specific amount of damages" or alleges "an amount under the jurisdictional minimum, the removing party . . . must prove by a preponderance of the evidence that the amount in controversy [exceeds the jurisdictional amount]." *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003). Like the Fifth and Seventh Circuits, the Eighth Circuit places the "to a legal certainty" burden on the party challenging federal jurisdiction.[2]

---

[2] The Second and Tenth Circuits have adopted standards for when the complaint is silent as to the amount in controversy, but have not addressed the standard when the plaintiff pleads an ad damnum below the jurisdictional limit. The Second Circuit requires defendants to prove the amount in controversy "to a reasonable probability," meaning by a preponderance of the evidence. *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1421 (2d Cir. 1997) (quoting *McNutt v. Gen. Motors Acceptance Corp.*,

(Continued on following page)

In sum, the Third Circuit's decision wholly or partially conflicts with every other circuit court that has addressed the burden of proof on a removing defendant in the diversity context. The Court should grant the petition because it provides an ideal vehicle to redress the fractured decisions of the circuit courts of appeals under both 28 U.S.C. § 1332(a) and CAFA, and to provide guidance to those courts that have yet to address the issue.

II. The Panel's Decision Misapplies This Court's Decision In *St. Paul Mercury*.

The panel's decision below misapplies the Court's decision in *St. Paul Mercury* by inverting the Court's analysis in that case and applying it to situations where the pleaded amount does not limit damages. The rules of pleading have changed greatly since the Court's 1938 decision in *St. Paul Mercury*, limiting the usefulness of the *St. Paul Mercury* decision.

The proposition that a plaintiff can bar the door to federal court by specifically pleading damages below the jurisdictional amount first appeared in *Iowa Central Ry. v. Bacon*, 236 U.S. 305, 310 (1915), then reappeared in *St. Paul Mercury*. As discussed above, the proposition appeared in *St. Paul Mercury* only as *dictum*. The question

---

298 U.S. 178, 189 (1936)). The Tenth Circuit seems to have adopted a standard between a preponderance of the evidence and a legal certainty. The court has explained "that the requisite amount in controversy 'must be *affirmatively established* on the face of either the petition or the removal notice,'" and that "[t]he italicized language requires at a minimum that the jurisdictional amount be shown by a preponderance of the evidence." *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 (10th Cir. 2001) (quoting *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (emphasis added)).

before the Court in *St. Paul Mercury* was whether a plaintiff's post-removal amendment reducing the amount in controversy below the jurisdictional limit could extinguish federal diversity jurisdiction when at the time of removal the complaint demanded more than the jurisdictional amount. *St. Paul Mercy*, 303 U.S. at 284.

Red Cab Company sued St. Paul Mercury Indemnity Company in an Indiana state court. *Id.* St. Paul Mercury removed to federal district court, after which Red Cab filed two amended complaints, the second of which contained an exhibit showing actual damages of $1,380.89 – less than the then-jurisdictional amount of $3,000. *Id.* at 284-85. Red Cab did not move to remand, however, and recovered $1,162.98 in a bench trial in the district court. *Id.* at 285. St. Paul Mercury appealed the decision to the Seventh Circuit, which ruled that Red Cab's actual claim was below the jurisdictional amount of $3,000, and thus the district court had been without jurisdiction. *Id.* On appeal, this Court ruled that for cases originally brought in federal court, the plaintiff's good-faith demand controls jurisdiction:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.

Id. at 288-89 (footnotes omitted). Accordingly, the Court determined that the party challenging federal jurisdiction in an action initiated in federal court bore the burden of proving to a legal certainty that the amount in controversy does not exist.

The Court then turned to the question of whether a plaintiff could extinguish federal diversity jurisdiction by a post-removal reduction of the amount in controversy. The Court held that "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached." *Id.* at 293 (footnote omitted). In *dictum*, while discussing the merits of its holding, the Court opined that if a plaintiff "does not desire to try his case in the federal court he may resort to the expedient for suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *Id.* at 294.

The panel below (like the Ninth Circuit in *Lowdermilk*), misapplied the Court's *dictum* to justify inverting the Court's analysis in *St. Paul Mercury* to impose the legal-certainty requirement on the removing defendant, the proponent of federal jurisdiction. *Morgan*, 471 F.3d at 474; *Lowdermilk*, 479 F.3d at 999. The panel stated that because "CAFA does not change the proposition that the plaintiff is the master of her own claim," it is appropriate to impose the legal-certainty test on the defendant to prove the amount in controversy exists. *Morgan*, 471 F.3d at 474.

The panel's inverted *St. Paul Mercury* analysis would have been improper in 1938, but developments in the law since *St. Paul Mercury* have made even more problematic

the panel's reliance on the Court's *dictum* to give credence to a plaintiff's ad damnum as a basis of avoiding federal jurisdiction. As the Fifth Circuit recognized in *De Aguilar*, the Court's *dictum* in *St. Paul Mercury* "was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint." *De Aguilar*, 47 F.3d at 1410. This premise was nearly universally held at the time of *St. Paul Mercury*. For example in *St. Paul Mercury*, the Court cited *Woods v. Massachusetts Protective Association*, 34 F.2d 501 (E.D. Ky. 1929) to demonstrate a plaintiff's ability to avoid federal diversity jurisdiction by pleading less than the jurisdictional amount. *St. Paul Mercury*, 303 U.S. at 294. Under the state provision in that case, "if there had been no removal and an answer had been filed, plaintiff would not have been entitled to judgment for more than [the amount pleaded]." *Woods*, 34 F.2d at 504; *see also Iowa C. Ry.*, 236 U.S. at 309 ("[t]he state court had authority to determine the effect of the prayer to the petition and it decided that, under the petition, no more than the amount prayed for could be recovered in the action"); *Harley v. Fireman's Fund Ins. Co.*, 245 F. 471, 476 (W.D. Wash. 1913) (plaintiff cannot recover more than the amount demanded in the initial pleading); *Maine v. Gilman*, 11 F. 214, 215 (C.C.D. Me. 1882) (same).

But state pleading rules have changed greatly since 1938, and most states have now adopted rules that, like Federal Rule of Civil Procedure 54(c), do not limit damages to the amount specified in a plaintiff's ad damnum. *E.g.*, Ala. R. Civ. P. 54(c); Alaska R. Civ. P. 54(c); Ariz. R. Civ. P. 54(d); Ark. R. Civ. P. 54(c); Cal. R. Civ. P. § 580(a); Colo. R. Civ. P. 54(c); D.C. R. Civ. P. 54(c); Ga. Code Ann. § 9-11-54(c); Haw. R. Civ. P. 54(c); 735 Ill. Comp. Stat.

5/2-604 (2007); Idaho R. Civ. P. 54(c); Ind. Tr. R. 54(c); Kan. R. Civ. P. § 60-254(c); Ky. R. Civ. P. CR 54.03(2); La. R. Civ. P. Art. 862; Me. R. Civ. P. 54(c); Mass. R. Civ. P. 54(c); Mich. Ct. R. 2.601(A); Minn. R. Civ. P. 54.03; Mont. R. Civ. P. 54(c); Nev. R. Civ. P. 54(c); N.J. Ct. R. 4:42-6; N.M. R. Civ. P. 1-054(C); N.Y. R. Civ. P. § 3017(a); N.D. R. Civ. P. 54(c); Ohio R. Civ. P. 54(c); Okla. R. Civ. P. § 2004(B)(2); R.I. R. Civ. P. 54(c); S.C. R. Civ. P. 54(c); Tenn. R. Civ. P. 54.03; Utah R. Civ. P. 54(c)(1); Vt. R. Civ. P. 54(c); Wash. R. Civ. P. 54(c); W. Va. R. Civ. P. 54(c); Wisc. Stat. (Rule) § 806.01(c); Wyo. R. Civ. P. 54(c). *But see* Miss. R. Civ. P. 54(c). Accordingly, a plaintiff's ad damnum clause usually has no effect on the actual stakes in the case.[3] *See BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 552 (7th Cir. 2002).

Indeed, even the Third Circuit recognized the illusory effect of the ad damnum, agreeing with the Fifth Circuit that modern rules of pleading "'have created the potential for abusive manipulation by the plaintiffs, who may plead damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with knowledge that they may be able to evade federal jurisdiction by virtue of the pleading.'" *Morgan*, 471 F.3d at 477 n.8 (quoting *De Aguilar*, 47 F.3d at 1410). Notwithstanding that acknowledgement, the net effect of the panel's adherence to the *St. Paul Mercury dictum* is that a plaintiff's ad damnum is binding only on the defendant who would otherwise be entitled to remove.

---

[3] As the Seventh Circuit has suggested, the only way for a plaintiff to avoid federal diversity jurisdiction is to stipulate before removal that the plaintiff is waiving any damages that exceed the jurisdictional amount. *BEM*, 301 F.3d at 552.

Changes in the law have thus made obsolete the Court's *dictum* that a plaintiff can avoid federal jurisdiction by "resort[ing] to the expedient for suing for less than the jurisdictional amount." *St. Paul Mercury*, 303 U.S. at 294. The panel's decision (and the Ninth Circuit's decision in *Lowdermilk* permits a plaintiff to deprive a defendant of its right to proceed in federal court (or even imposing higher burdens of proof solely because of a plaintiff's ad damnum) creating the very inequities the Court sought to avoid in *St. Paul Mercury*. The present case provides the Court with the opportunity to clarify that its nearly 70-year-old *dictum* applies only in those increasingly rare situations where the pleaded amount limits damages, as was routinely the case in 1938.

III. The Court Should Grant The Petition To Prevent Plaintiffs From Unfairly Depriving Defendants Of Access To Federal Fora.

The Court should also grant the petition to prevent plaintiffs from unfairly depriving defendants of access to federal fora. Although the tripartite conflict among the federal courts of appeals alone warrants this Court's review of the Third Circuit panel decision, the very real potential for procedural gamesmanship, as well as federal forum-shopping, by litigants to avoid federal jurisdiction provides an independent basis for this Court's review. And although this case arises under CAFA, it will affect all cases removed on the basis of diversity where the amount in controversy is at issue.

The effects of the Third Circuit's decision are particularly pernicious to the public policies underlying Congress' enactment of CAFA. Congress adopted CAFA to curb abuse of the class-action device. Pet. App. at 31a-32a. These

abuses included plaintiffs' collusive use of multiple class actions arising from the same operative facts and asserting the same claims on behalf of the same people, proceeding simultaneously in multiple state courts to multiply defendants' costs and, effectively, to blackmail defendants into settling even frivolous claims. S. Rep. 109-14, at *4, *20-21, *reprinted in* U.S.C.C.A.N. 3. Congress also expressed disapproval for many state courts' willingness to "freely issue rulings in class action cases that have nationwide ramifications, sometimes overturning well-established rules and policies of other jurisdictions." *Id.* at *4.

The Second Chance Body Armor, Inc. ("SCBA") litigation exemplifies the abuses that CAFA is intended to prevent. In the SCBA litigation, the same class-action plaintiffs' counsel initiated putative class actions in five states, alleging various state law claims regarding allegedly defective bullet-resistant vests produced by SCBA on behalf of a putative nationwide class of vest purchasers and users. *City of Bridgeton v. Toyobo Co.*, No. CUM-L-000036-04 (Cumberland Cty. Super. Ct., N.J.); *Johnson v. Second Chance Body Armor, Inc.*, No. 2004-003268 (La. 14th Cir. Ct.); *LaBrosse v. Toyobo Co.*, No. 04-402021-CZ (Wayne Cty. Cir. Ct., Mich.); *Lemmings v. Second Chance Body Armor, Inc.*, No. CJ-2004-62 (Mayes Cty. Dist. Ct., Okla.); *Scannell v. Toyobo Co.*, No. CV 04-9288 GPS (Cal. Super. Ct.). In each instance, class-action plaintiffs' counsel named one non-diverse defendant to ensure that the cases could not be removed and transferred to a multi-district litigation panel. The net effect of class-action plaintiffs' collusive multi-state strategy was to force SCBA to incur millions of dollars in legal fees before finally declaring bankruptcy. *See In re Second Chance Body Armor, Inc.*, No. 04-12515 (Bankr. W.D. Mich.).

Congress expressly incorporated its finding that abuses of the class-action device, like those in the SCBA litigation, arose from manipulative pleading by plaintiffs to avoid federal diversity jurisdiction:

> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are –
>
> (A) keeping cases of national importance out of Federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.
>
> (b) PURPOSES. – The purposes of this Act are to –
>
> . . . .
>
> (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction

Pet. App. at 31a-32a.

The Third Circuit's imposition of an impossibly high evidentiary burden on removing defendants, in conjunction with deference to plaintiffs' non-binding ad damnum clauses in their state court complaints, combine to frustrate the purposes for which Congress enacted CAFA. The Third and Ninth Circuits' decisions reward state-court

forum-shopping by class-action plaintiffs' counsel who know that by pleading damages less than the jurisdictional amount, they can ensure that defendants are denied access to federal fora, at least until after important decisions are made regarding class certification, choice of law, and the like. And even if defendants can later remove, they are stuck with the decisions made in state courts because "[w]hen a case is removed the federal court takes it as though everything done in the state court had in fact been done in the federal court." *Munsey v. Testworth Labs.*, 227 F.2d 902, 903 (6th Cir. 1955); *Savell v. Southern Ry.*, 93 F.2d 377, 379 (5th Cir. 1937); *see also Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 436 (1974) ("After removal, the federal court 'takes the case up where the State court left it off.'" (quoting *Duncan v. Gegan*, 101 U.S. 810, 812 (1880)).

Likewise, the Third and Ninth Circuits' formulations of the burden on removing defendants make it more difficult, if not impossible, to aggregate and efficiently manage nationwide litigation. Not only is such piecemeal litigation inefficient, but it creates the type of situations where a plaintiff can engage in "judicial blackmail" to coerce defendants to settle even frivolous claims. These are the very schemes Congress hoped to prevent by implementing CAFA.

The deference given to plaintiffs' non-binding ad-damnum allegations under the Third and Ninth Circuits' formulation of the burden on removing defendants has a deleterious effect on removal under CAFA under 28 U.S.C. § 1332(d), and traditional removal under 28 U.S.C. § 1332(a). Under CAFA, a defendant is left with unpalatable options: It can wait until it has a smoking gun to

prove the amount in controversy to a legal certainty (and bear the risks of litigating class certification and other issues in state court or courts); it can remove with the risk of remand precluding access to federal court by means of the law-of-the-case doctrine; or it can remove on the assumption that if the case were remanded, the parties can play judicial ping-pong between state and federal courts until the amount in controversy is met or the plaintiffs enter into a binding stipulation limiting damages. Even if the state court were to apply judicial estoppel to limit the plaintiff's damages to less than the jurisdictional amount, the defendant remains unable to access federal court, and the policies underlying CAFA are negated.

But the defendant subject to traditional removal requirements under 28 U.S.C. § 1332(a) is subject to a worse predicament. Unlike CAFA removal, traditional removal must occur within 30 days of service of the complaint or other pleading conferring jurisdiction, but never more than one year after the suit is initiated. 28 U.S.C. § 1441(b). After one year passes, the plaintiff is free to modify his or her ad damnum or file pleadings demanding more than the jurisdictional amount without capping monetary damages or the risk of judicial estoppel.

The Third and Ninth Circuits' formulation of the burden on removing defendants gives rise to risks of jurisdictional manipulation and gamesmanship that will unfairly deprive defendants of their statutory right to litigate in federal court. For all these reasons, the Court should grant the petition and clarify the appropriate standards for removal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. BURSCH*
MATTHEW T. NELSON
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000

Counsel for Amicus Curiae
Defense Research Institute

**Counsel of Record*

JUNE 2007